Supreme Court, U.S.
FILED

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Docket Number _____

In The

SUPREME COURT OF THE UNITED STATES

FRANK PAUL LUKACS,

Petitioner,

v.

HONORABLE DONNA E. SHALALA, ET AL,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825
Petitioner Pro Se

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QUESTIONS PRESENTED FOR REVIEW

I. Under strict scrutiny, are the racial and gender classifications of the US government's affirmative action and diversity programs narrowly tailored measures that further compelling governmental interests?

II. Does res judicata apply on a duplicative of claims dismissal where there has not been any final judgment on the merits?

III. Is the pendency of an earlier action grounds for the sua sponte dismissal of a subsequent action with "common questions of law or fact pending before the court"?

IV. Does a Rule 41(a)(1) dismissal without prejudice operate as an adjudication upon the merits and have res judicata effect?

V. Does a continuing series of wrongful acts resulting in ongoing damage permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine?

VI. Will issue or claim preclusion be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the issue or claim?

VII. Does res judicata apply to new claims and isues contained in a docketed amended pleading where the party is denied the right to amend "once as a matter of course at any time before a responsive pleading is served"?

VIII. Must the parties have reasonable notice and opportunity to be heard before the sua sponte application of claim preclusion?

LIST OF ALL PARTIES TO THE PROCEEDING

No. 99-1334
CA-98-4133-PJM

FRANK PAUL LUKACS,

Plaintiff - Appellant,

versus

DONNA E. SHALALA, Secretary, Department of Health and Human Services; HAROLD E. VARMUS, Director, National Institutes of Health; RICHARD KLAUSNER, Director, National Cancer Institute,

Defendants - Appellees.

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18 Moore's Federal Practice 3D, § 131.01 (Matthew Bender 3d ed.) under section entitled "Fundamental Principles of Claim Preclusion (Res Judicata) Doctrine - Doctrine Bars Claims Which Were Subject of Prior Judgment". .. 9

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CITATIONS OF THE REPORTS

The Memorandum and Order of the United States District Court, District of Maryland, dated January 25, 1999 and filed on January 28, 1999 in PJM-96-2913 is attached as Appendix A.

Petitioner appeals from the Fourth Circuit Court of Appeals (USCAFC) judgment in Frank Paul Lukacs, Plaintiff-Appellant, versus Donna E. Shalala, Secretary of Health and Human Services, et. al. Defendants-Appellees, USCAFC Case Number 99-1334 (CA-98-4133-PJM), entered on June 22, 1999 (Appendix B).

Petitioner's Petition for Rehearing and Petition for Rehearing In Banc in USCAFC Case Number 99-1334 (CA-98-4133-PJM) was denied by the USCAFC on August 31, 1999 (Appendix C).

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 1651. Since a review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance was initially stated as "Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 and §1343. Authority for this Complaint is provided in the Fourteenth Amendment Equal Protection Clause of the United States Constitution, by the Fifth Amendment Due Process Clause of the United States Constitution, by 42 U.S.C. §2000e, et. seq. under Title VII of the Civil

Rights Act of 1964, and under 29 U.S.C. §621 et. seq."

CONSTITUTION, STATUTES, REGULATIONS

The citations of the relevant Constitutional provisions, statutes, and regulations involved in the case follow, with their pertinent text set out verbatim in the appendix (Appendix D): Fourteenth Amendment Equal Protection Clause of the United States Constitution; Fifth Amendment Due Process Clause of the United States Constitution; 42 U.S.C. §2000e-16, et seq. under Title VII of the Civil Rights Act of 1964; 42 U.S.C. §2000e-2 Unlawful Employment Practices; 42 U.S.C. §2000e-2, et seq. under Title VII of the Civil Rights Act of 1964; 5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d); 5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c); 29 C.F.R. § 1614.408 Civil action: Title VII, Age Discrimination in Employment Act, and Rehabilitation Act; 29 C.F.R. 1614.108 Investigation of Complaints; Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM); Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA); Federal Rules of Civil Procedure Rule 15, Amended and Supplemental Pleadings; Federal Rules of Civil Procedure Rule 42, Consolidation, Separate Trials.

STATEMENT OF THE CASE

Is the federal judicial system prejudiced and biased against caucasian males challenging the legality and constitutionality of affirmative discrimination and diversity programs for minorities and females and hispanics, which the federal judicial system is responsible for creating and maintaining, and is the federal judicial system ignoring all legal precedent via its sua sponte orders to be able to continue such programs of favoritism and preference indefinitely?

The reality of the matter is that the federal judicial system is demonstrating its intolerance of, and outright hostility towards, this white male challenging its affirmative action and diversity programs for minorities and females and hispanics.

The federal judicial system has dismissed three of this white male's timely filed federal civil actions, even though defendants themselves were the ones instructing and directing petitioner that he had a right to file a civil action within ninety days of a final agency decision according to Title VII and 29 C.F.R. § 1614, and even though the federal judicial system would have gladly welcomed the same federal civil actions had they been filed by a minority, female, or hispanic.

In the only civil action which did not have a verified pleading, the federal judicial system has in writing threatened this white

male petitioner with sanctions if he even dared to exercise his right to file motions or pleadings, including amending his pleading once as a matter of course before a responsive pleading was served, even though the federal judicial system would have gladly welcomed and granted more than one amended pleading had they been filed by a minority or female.

The federal judicial system is now further demonstrating its own prejudices and biases by refusing to even consider and dismissing this white male petitioner's pleading, using the irapplicable doctrine of res judicata, even though the federal judicial system would have gladly welcomed and considered the different facts and issues of the present pleading had it been filed by a minority, female, or hispanic.

The federal court system is willing to totally negate this white male's qualifications and merit just so that a less qualified or an even totally unqualified minority or female or hispanic will nevertheless be selected for a job vacancy. The federal court system is willing to distort and misrepresent the facts and ignore all legal precedent and make up its own phony and counterfeit legal theories in defense of affirmative action and diversity programs for minorities and females and hispanics. (The district court opinion of Appendix AAA is so full of misrepresentations and false and deliberately misleading statements that

petitioner will merely refer the reader to Appendix YY and Appendix ZZ for the truth.)

The reality of the matter is that the federal judicial system believes that if a minority does not immediately get waited upon at a sit down restaurant then this minor inconvenience which we have all frequently encountered is considered egregious discrimination worthy of a multimillion dollar federal civil action, but if a white male who timely files several Equal Employment Opportunity complaints as per 29 C.F.R. § 1614 as is his right as a federal government employee and organizes European American Males in Government along the lines of such officially sanctioned organizations such as Blacks in Government and Federally Employed Women and as a direct result is given a quit or be fired ultimatum and is given one hour to clean out his desk and physically leave his place of employment with no reason ever given for this unjustifiable abrupt action and is thereafter unable to find employment for four years now, then the federal judicial system believes that this is justified punishment for his ever complaining about the harm and injury he has suffered from so called affirmative action and diversity programs for minorities and females and hispanics, and that he should be made an example to warn others of what happens to any white male who follows the correct procedures of 29 C.F.R. § 1614 to challenge the discrimination inherent in the

preferences and favoritism of so called affirmative action and diversity for minorities and females and hispanics.

Petitioner from the date of his first Equal Employment Opportunity (EEO) complaint at the National Institutes of Health (NIH) in January of 1991, despite his having applied on an average of about once every month for advertised job vacancy announcements and benefits, and having timely filed over sixty different, separate, and distinct individual EEO complaints "within 45 days of the date of the matter alleged to be discriminatory" as per 29 C.F.R. § 1614, on about fifty of which EEO complaints there was never any of the 29 C.F.R. § 1614 mandatory processing and independent investigation by the agency, (See Appendix D) has never once in all this time ever been selected for a so called affirmative action designated or diversity designated or Federal Equal Opportunity Recruitment Program (FEORP) designated or Affirmative Employment Program (AEP) designated job opening or benefit, which are in effect set aside for minorities and women and hispanics, at the NIH, at DHHS, or anywhere else in the entire United States federal government.

Although this caucasian male may be unemployed for over four years because of affirmative action and diversity programs, the federal court system will see no harm or injury in that, and besides the federal court system regards that as a small price to pay by

this white male just so that the benefits and preferences and favoritism for minorities and females and hispanics will continue.

By these actions, the federal court system is merely demonstrating its own prejudices and biases against white males.

REASONS FOR ALLOWANCE OF THE WRIT

I. PJM-97-379, PJM-97-3359, PJM-97-3495

Petitioner Pro Se, following the very specific directions and instructions of Defendants and the Equal Employment Opportunity Commission to file a civil action within 90 days of a final agency or EEOC decision, filed five civil actions PJM-96-2913, PJM-97-379, PJM-97-3359, PJM-97-3483, and PJM-97-3495, representing about five dozen separate and distinct Equal Employment Opportunity complaints which were timely filed over the course of about five years, and all timely filed either within initially 30 or later 45 days of a discriminatory event as per the relevant rules and regulations. (See appendices R, S, T, U, V, W.)

The district court, not knowing much less caring about the fact that petitioner was following the specific written instructions and directions of the agency and the EEOC as contained in their final decisions, sua sponte dismissed civil actions PJM-97-379, PJM-97-3359, and PJM-97-3495, for although they were

supposedly not "actions involving a common question of law or fact pending before the court", they were nevertheless supposedly "duplicative of claims set forth by Pro Se Plaintiff Lukacs in two other cases before this Court, Civil Action No. PJM-96-2913 and Civil Action No. PJM-97-3483", even though according to 29 C.F.R. § 1614 petitioner had to have filed the original complaints and their amended complaints as they were filed chronologically and that according to 29 C.F.R. § 1614 petitioner could not have filed all five of the civil actions at the same time. (See Appendices JJ, VV, WW, and XX).

Outside of the fact that according to the relevant case law that instead of having dismissed PJM-97-379, PJM-97-3359, and PJM-97-3495 that the district court should have instead **consolidated** PJM-97-379, PJM-97-3359, and PJM-97-3495, with PJM-96-2913 and PJM-97-3483, (See Appendices X, Y, DD, and EE), the reality of the matter is that because of the district court action itself, especially due to the fact that there had been no final decision on the merits, PJM-97-379, PJM-97-3359, or PJM-97-3495 cannot possibly be used for either claim preclusion or issue preclusion purposes. "The pendency of an earlier action in the same federal district court was not a ground for dismissal of a subsequently instituted action that was alleged to be based on a cause of action identical to that in the pending action

against the same defendants, and the proper solution would be to consolidate those actions. *Thomas v. Deason*, D.C.Ky. 1970, 317 F.Supp. 1098, 1099." 9 Wright & Miller, Federal Practice and Procedure: Civil 2d § 2383 (1995). *Miller v. U.S. Postal Serv.*, C.A.5th, 1984, 729 F.2d 1033. 9 Wright & Miller, Federal Practice and Procedure: Civil 2d § 2383 (1995). *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988). 8 Moore's Federal Practice, § 42.10 [1] [c] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Multiple Filings by One Plaintiff May be Consolidated".

"Modern courts, in applying the *Cromwell* definition of the claim preclusion doctrine, have stated that at least three elements must be present before a claim will be barred as a result of a judgment in a prior action:

(1) **there must have been a final judgment on the merits**

(2) the prior action must have involved the same parties or their privies

(3) **the prior action must have involved the same claim.**

18 Moore's Federal Practice 3D, § 131.01 (Matthew Bender 3d ed.) under section entitled "Fundamental Principles of Claim Preclusion (Res Judicata) Doctrine - Doctrine Bars Claims Which Were Subject of Prior Judgment".

In PJM-97-379, PJM-97-3359, and PJM-97-3495 there was not a final judgment on the merits. Nor did they involve the same claims.

II. PJM-97-3483

Petitioner attempted to amend his complaint in PJM-97-3483, which at the time included only about a dozen of petitioner's EEO complaints, with a **verified pleading**, which except for the parties, was the exact same complaint which was filed in PJM-98-4133, and which would therefore contain about four dozen of petitioner's EEO complaints.

Unfortunately, petitioner's "Motion for Leave to File an Amended Complaint" in PJM-97-3483 dated September 08, 1998, "Memorandum in Support of Plaintiff's Motion for Leave to File an Amended Complaint" in PJM-97-3483 dated September 08, 1998, and "Amended Complaint" in PJM-97-3483 were not even allowed to be docketed by the district court judge, and in fact were physically returned to petitioner with the notation that "Pursuant to the verbage in attached Memorandum Opinion and Order (signed by Judge Peter J. Messitte, dated September 8, 1998), no further pleadings are to be filed", with the exact wording of the order of the district court judge rather coincidentally being dated September 08, 1998 but rather coincidentally not being filed until September 15, 1998, being that "neither party shall file further pleadings in this Court". (See Appendix LL.)

Petitioner in PJM-97-3483 on October 07, 1998 filed a "Notice of Voluntary Dismissal Without Prejudice of Civil Action Number PJM-

97-3483 Pursuant to Federal Rules of Civil Procedure Rule 41(A)(1)". **Federal Rules of Civil Procedure (FRCP) Rule 41 Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof (1) By Plaintiff; by Stipulation** states that "Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of any United States, **an action may be dismissed by plaintiff without order of court (I) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, wherever first occurs,** or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, **the dismissal is without prejudice**, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.". **Defendants by October 07, 1998 had not filed either an answer or a motion for summary judgment in PJM-97-3483. Petitioner had not even once dismissed in any court of the United States or of any state an action based on or including the same claim.** Thus plaintiff stated on October 07, 1998 in PJM-97-3483 that "Plaintiff respectfully submits this **notice of voluntary dismissal without prejudice** of civil action number PJM-

97-3483 pursuant to Federal Rules of Civil Procedure (FRCP) Rule 41 Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof (1) By Plaintiff; by Stipulation." Thus since the notice of voluntary dismissal was without prejudice, since Defendants by October 07, 1998 had not filed either an answer or a motion for summary judgment, and since petitioner had not even once dismissed in any court of the United States or of any state an action based on or including the same claim, PJM-97-3483 can not be used as either claim preclusion or issue preclusion.

The district court judge, without any case law at all, writes that dismissal without prejudice does have a res judicata effect. (See Appendix A.) The appellate court, also without any case law at all, agrees that dismissal without prejudice does have a res judicata effect. (See Appendix B and C.) Petitioner disagrees. (See Appendix BB & CC.)

"**Judgment without prejudice does not preclude subsequent action on same claim.** *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (**"Dismissal ... "without prejudice" is a dismissal that does not "operate as an adjudication upon the merits".**")." 18 Moore's Federal Practice 3D, § 131.30 [3] [a] (Matthew Bender 3d ed. 1997) under section entitled "When Judgment is Considered *On the Merits* - Federal Rules Define When Judgment is *On the Merits* for Preclusion Purposes".

"A dismissal of an action *without prejudice* is an indication that the judgment is not on the merits and will therefore have no preclusive effect. Federal Rules of Civil Procedure 41 provides that voluntary dismissals of an action will usually be considered to be without prejudice unless otherwise indicated in the stipulation or request for dismissal. ... **Dismissal without prejudice indicates that judgment is not on merits and will have no preclusive effect.** see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, L. Ed. 2d 350 (1990) (**""Dismissal without prejudice" is a dismissal that does not "operate as an adjudication upon the merits", Rule 41(a)(1), and thus does not have a res judicata effect".); Restatement (Second) of Judgments § 20(1)(b) 1982."** 18 Moore's Federal Practice 3D, § 131.54 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Avoiding Operation of Claim Preclusion Doctrine - Dismissal Without Prejudice".**

III. PJM-96-2913

The original pleading in PJM-96-2913 contained about a half a dozen of petitioner's timely filed Equal Employment Opportunity (EEO) complaints, namely his sixth, his seventh, his tenth, his twenty ninth, his thirty first, and his thirty eighth EEO

complaints, none of which were ever processed or investigated as they should have been according to 29 C.F.R. § 1614, although EEO complaints of minorities and females and hispanics at the same time were being actively and aggressively processed and investigated, by not too surprisingly the same people also delegated the responsibility of creating and maintaining so called affirmative action and diversity programs for minorities and females and hispanics. (See Appendices D, E, F, & G.)

The processing and investigation of plaintiff's EEO complaints by the agency would have contained **depositions, answers to interrogatories, admissions, and affidavits** which would have been admissible as evidence in federal court.

"Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term, condition, or privilege of employment. An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a "privileg[e]" of employment under Title VII. **A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion**, even if the employer would be free under the employment contract simply not to provide the benefit at all.

Those benefits that comprise the "incidents of employment," S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), [FN7] or that form "an aspect of the relationship between the employer and employees," *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971), [FN8] may not be afforded in a manner contrary to Title VII." *Hishon v. King & Spalding*, 467 U.S. 69, at 75-76 (1984).

Petitioner tried to amend his original pleading in PJM-96-2913, with a **verified pleading**, which except for the parties, was the exact same complaint which was filed in PJM-98-4133, to include about four dozen more of his separate and distinct Equal Employment Opportunity (EEO) complaints, namely those EEO complaints which had been dismissed in PJM-97-379, PJM-97-3359, and PJM-97-3495. (See Appendix AA.)

Petitioner filed an **amended verified complaint** in PJM-96-2913 on August 19, 1998, according to Federal Rules of Civil Procedure Rule 15 (a) Amendments by which **"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served"**, for by August 19, 1998 a responsive pleading had not been served, and for that matter a responsive pleading was never served in any of plaintiff's civil actions, which except for the parties, is the exact same complaint which petitioner filed in PJM-98-4133. (See Appendix AA.)

On September 01, 1998 Defendants filed a motion for an enlargement of time to respond to the amended complaint until September 30, 1998. (See Appendix BB.)

An order of the district court physically returned petitioner's **amended verified complaint** filed on August 19, 1998, in an envelope dated September 02, 1998, for supposedly "A "Motion for Leave to File an Amended Complaint" and proposed Summonses prepared in blank is required (in duplicate)". (See Appendix CC.)

Petitioner filed an **amended verified complaint** "once as a matter of course before a responsive pleading has been served", since **Defendants never did serve a "responsive pleading" in any of petitioner's civil actions**, on September 08, 1998 in PJM-96-2913, which became **docketed paper numbered 75**, which, except for the parties, is the exact same complaint which petitioner filed in PJM-98-4133, and which petitioner filed according to the specific instructions and directions contained in an order of the district court mailed in an envelope dated September 02, 1998, instructing petitioner to file "A Motion for Leave to File an Amended Complaint" with the amended complaint. (See Appendix FF & GG.)

On September 16, 1998 the district issued an ORDER extending the time for the Defendants to answer, move, or otherwise plead to Plaintiff's Amended Complaint through September 30, 1998. (See Appendix KK.)

On October 06, 1998 in PJM-96-2913 plaintiff filed a motion for, and a memorandum in support of the motion for, a preliminary injunction or in the alternative for a permanent injunction on the National Institutes of Health and the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP) and Affirmative Employment Program (AEP) and all other so called affirmative action or diversity programs for minorities, females, or hispanics, which became **docketed paper numbered 86**. (See Appendices J, K, HH, & II.)

Since Defendants did not answer, move, or otherwise plead to Plaintiff's Amended Complaint in PJM-96-2913, on October 08, 1998 plaintiff filed a motion and a memorandum in support of the motion for judgment by default according to FRCP Rule 55, as plaintiff had previously done in PJM-97-379, PJM-97-3359, and PJM-97-3495, which three civil actions being in reality "duplicative of motions for judgment by default" being rather hastily found by the pro-affirmative action judge in a sua sponte order to somehow or other be "duplicative of claims", whatever that was supposed to mean, for even the appellate court could not find any published cases on this new bogus legal theory, a notion which had never even remotely been suggested by defendants. (See Appendices Z, MM, and NN.)

An order of the district court in PJM-96-2913 specifically in writing refused to even

consider petitioner's "Motion for Leave to File an Amended Complaint" with the amended complaint dated September 08, 1998, which is **docketed paper numbered 75** in the docket sheet of PJM-96-2913, and which was filed according to the specific instructions and directions of the district court which directed petitioner to file a "Motion for Leave to File an Amended Complaint" with the amended complaint. (See Appendix OO.)

In PJM-96-2913 the district court dismissed all of petitioner's pending motions stating that **"The Court will not consider these motions, docketed Papers 70, 71, 72, 74, 75, and 86."**. The district court also stated that "The Clerk of this Court will be directed to not docket any more pleadings by Plaintiff", (See Appendix LL and OO).

"The leading case regarding the trial court's exercise of discretion to deny amendment is *Foman v. Davis*. (*Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962)). In *Foman*, the Supreme Court asserted that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 3 Moore's Federal Practice, § 15.15 [1] (Matthew Bender 3d ed.).

Verified pleadings "may properly be considered as equivalent to a supporting or

opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (**verified complaint treated as equivalent of an affidavit on a motion for summary judgment**) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings.

So in reality, because of none other than the orders of the district court itself, there is nothing left of PJM-96-2913 which can even be used for purposes of claim or issue preclusion.

A simple broad claim by claim analysis for "Federal Sector Equal Employment Opportunity" civil actions is inappropriate, for the claims themselves are based upon the "**same transaction**" or "**same factual allegation**" of the complaint, which however because of 29 C.F.R. § 1614 is limited in that for each transaction or factual allegation or "**matter alleged to be discriminatory**", to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a separate and distinct Equal Employment Opportunity (EEO) complaint "**within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of**

the effective date of the action", and thus in effect **each separate and distinct EEO complaint within 45 days of the date of the matter alleged to be discriminatory is a separate and distinct transaction and a separate and distinct factual allegation for purposes of claim analysis.**

Even the district court opinion and final order itself in PJM-96-2913 dated November 12, 1998 and entered on November 17, 1998, which is merely a series of misrepresentations and false and deliberately misleading statements, does not purport to address anything except petitioner's sixth, seventh, tenth, twenty ninth, thirty first, and thirty eighth EEO complaints. (See Appendix AAA, YY, and ZZ.)

Even however if one nevertheless does perform a simple and basic cursory claim by claim analysis, the original complaint in PJM-96-2913 did not include any claims at all for harassment or constructive discharge. Although petitioner attempted to introduce claims for harassment and constructive discharge in his amended complaints, these amended complaints were either not allowed to even be docketed and physically returned to petitioner or completely purposefully by a written order of the district court not even considered by the district court. Thus it was because of the district court actions themselves that appellant could not raise the claims of harassment and retaliatory

constructive discharge and thus these claims were "**matters which could not have been raised in prior litigation**" and on which petitioner did not have a "**full and fair opportunity to litigate the claim in the prior proceeding**" and thus cannot be used for purposes of claim preclusion or issue preclusion.

The opinion and final order of the district court in PJM-96-2913 dated November 12, 1999 dismissed the claim of a hostile work environment supposedly since "Lukacs had failed to exhaust his administrative remedies before bringing a claim for hostile work environment". "In an action brought by produce growers against a packing company, the defendant's authorization to promulgate agricultural standards was found **not to have been decided in a prior case, because it had been dismissed for failure to exhaust administrative remedies**. ... **Dismissal for failure to exhaust administrative remedies.** *Wileman Bros. & Elliot, Inc. v. Gianini*, 909 F.2d 332, 336-337 n.8 (9th Cir. 1990) (issue preclusion does not apply because earlier case was dismissed and issue was never decided)." 18 Moore's Federal Practice 3D, § 132.03 [2] [1] [I] (Matthew Bender 3d ed.) under section entitled "Insufficient Procedures for Issue Preclusion Purposes - Dismissals". Thus the claim for hostile work environment cannot now be the subject of claim preclusion or issue preclusion.

The opinion and final order of the

district court in PJM-96-2913 dated November 12, 1999 dismissed the claim of breach of contract under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The opinion and final order of the district court in PJM-96-2913 dated November 12, 1999 also dismissed the "claim of failure to timely process EEO complaints" under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

"Federal Rule of Civil Procedure 12(b)(6) provides the basis for dismissing an action for "failure to state a claim upon which relief can be granted". Some cases, especially those decided before the adoption of Federal Rules, held that a dismissal for insufficient pleading was not on the merits. It was thought too harsh a remedy to preclude a party with a possibly meritorious claim from pursuing a second action simply because of a failure to meet some technical pleading requirement. This rationale was weakened considerably by the passage of the **Federal Rules of Civil Procedure, with their liberalized pleading requirements and right of amendment**. The Restatement (Second) of Judgments adopted the position that such a dismissal should be considered to be on the merits, reasoning that:

[s]uch a result is warranted by **the ease with which pleadings may be amended, normally at least once as a matter of course,** and by the unfairness of requiring the defendant to

submit to a second action (often initiated long after the first has come to an end) when no such **amendment is sought**, or when no **appeal has been taken from an erroneous denial of leave to amend**." 18 Moore's Federal Practice, § 131.30 [3] [e] (Matthew Bender 3d ed. 1997) under section entitled "Dismissal for Failure to State Claim Upon Which Relief Can Be Granted".

Unfortunately, although the Federal Rules of Civil Procedure do have "**liberalized pleading requirements and right of amendment**", and there is supposedly "**ease with which pleadings may be amended, normally at least once as a matter of course**", in this case the record amply demonstrates that plaintiff was denied his "**right of amendment**", there was difficulty if not impossibility "**with which pleadings may be amended**", including threatened sanctions for even filing an amended complaint, even those which are supposedly granted "**normally at least once as a matter of course**", so although "**amendment was sought**" and "**appeal has been taken from an erroneous denial of leave to amend**", since the district court purposefully and intentionally denied petitioner his "**right of amendment**", and petitioner **did not have a full and fair opportunity to litigate the claim in the prior proceeding**, the dismissal under Federal Rule of Civil Procedure 12(b)(6) of the claim of hostile working environment, and the claim of

breach of contract, and the claim of failure to timely process EEO complaints should not be able to be used for purposes of claim preclusion or issue preclusion.

Petitioner had also filed a Rule 56(f) affidavit on June 10, 1997, which was completely ignored by the district court. (See Appendix H and I.) Even petitioner's motion for leave to file the statement of material facts and affidavit and exhibits of plaintiff Frank Paul Lukacs which was filed on June 13, 1997, with the hearing originally scheduled for June 25, 1997, were completely ignored by the district court.

"Rule 56(e) provides that, when a properly supported motion for summary judgment is made, [FN4] the adverse party "must set forth specific facts showing that there is a genuine issue for trial." [FN5] ... FN5. This requirement in turn is qualified by Rule 56(f)'s provision that **summary judgment is refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition**." *Anderson v. Liberty Lobby*, Inc. 477 U.S. 242, at 250."

"**Summary judgment should be entered only after adequate time for discovery.** *RGI, Inc. v. Unified Indus., Inc.*, 963 F.2d 658 (4th Cir. 1991)." "Where the credibility of depositions is, or may be crucial, summary judgment becomes improper and a trial indispensable. *Cales v. C & O Ry.*, 46 F.R.D.

36 (W.D. Va. 1969)." "Opportunity to discover. The requirement that the non-moving party respond specifically to a summary judgment motion is qualified by **subdivision (f)'s requirement that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition**. *Nguyen v. CNA Corp.*, 44 F.3d 234 (4th Cir. 1995)."

Plaintiff proceeding pro se was not given a notice of a right to file affidavits and responsive material to prevent summary judgment against plaintiff.

"**Notice to pro se litigant of right to file affidavits and responsive material.** Once evidence has been submitted by the movant in a motion for summary judgment, it is the responsibility of the opposing party to introduce its own evidentiary material to the contrary. **Plaintiffs proceeding pro se, however, are entitled to have notice of their right to file affidavits and responsive material to prevent summary judgment against them.** *Davis v. City of Portsmouth*, 579 F.Supp. 1205 (E.D. Va. 1983), aff'd, 742 F.2d 1448 (4th Cir. 1984).

Thus even the few remaining claims which were disposed under the motion for summary judgment, since petitioner did not have a "**full and fair opportunity to litigate the claims in the prior proceeding**", cannot be used for purposes of claim preclusion or issue

preclusion.

The different, separate, and distinct transactions and facts of appellant's four dozen different, separate, and distinct EEO complaints in his civil actions can be characterized as "continuing wrongful conduct by defendant", or a "continuing series of wrongful acts permitting a series of actions", with each such action considered to be a separate claim unrestricted by the limitations of claim preclusion or duplication of claims.

"Many of the most difficult questions concerning the scope of claim preclusion arise in the context of **continuing wrongful conduct**. ... Whatever the cut-off date, **a continuing series of wrongful acts resulting in ongoing damage to the plaintiff will usually permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine**. ... **Continuing series of wrongful acts will usually permit series of actions.** *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) (**each time plaintiff is injured by defendant, cause of action accrues**); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (series of torts will give rise to several causes of action); see *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*,

669 F.2d 490, 494 (7th Cir.), cert. denied, 459 U.S. 943 (1982) (continuing antitrust violations); *United Food & Commercial v. City Foods, Inc.*, 878 F. Supp. 122, 123 (N.D.Ill. 1995) (**"[A] defendant's continuing course of conduct, even if related to conduct complained of in the earlier lawsuit, generally creates a separate cause of action."**) 18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled "Continuing Wrongful Conduct by Defendant".

Here appellant never had any, much less a "full and fair, opportunity to litigate" any of the claims or any of the issues. Appellant was not even permitted to "amend the party's pleadings once as a matter of course at any time before a responsive pleading is served", with the district court judge ordering the clerk of the court that appellant's amended complaints not even be docketed and ordering that they instead be physically returned to appellant.

"**Even if all of the other prerequisites for claim preclusion are met, it will not be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the prior proceeding. Party against whom claim preclusion is asserted must have had full and fair opportunity to litigate claim in prior proceeding.**" *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 & n.22, 102 S.

Ct. 1883, 72 L. Ed. 2d 262, reh'g denied, 458 U.S. 1133 (1982) (**although prior holdings regarding requirement of full and fair opportunity to litigate were in context of issue preclusion, invocation of claim preclusion is subject to same requirement**). *7th Circuit* *Pirella v. Village of N. Aurora*, 935 F.2d 909, 913 (7th Cir.), cert. denied, 502 U.S. 983 (1991) (**"It is a well-established principle that no decision may constitute res judicata if the party against whom it is asserted has not had a full and fair opportunity to litigate his claims."**) *9th Circuit* *California v. FCC*, 905 F.2d 1217, 1245 (9th Cir. 1990) (**claim preclusion no bar to subsequent action when party was not given full and fair opportunity to litigate claim in prior proceeding**). *11th Circuit* *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985) (**"It is well settled that res judicata cannot be applied against a party who did not have a full and fair opportunity to litigate an issue in a previous suit."**). 18 Moore's Federal Practice, § 131.41 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Parties To Be Bound Must Have Had Full and Fair Opportunity to Litigate Prior Claim"**.

As the record amply demonstrates, appellant did not have reasonable notice and opportunity to be heard *before* the application

of claim preclusion by the court, and in fact appellant did not have any notice at all or any opportunity at all to be heard *before* the application of claim preclusion by the court.

Even where trial courts raise preclusion issues sua sponte, "**the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied.** *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (**sua sponte application of preclusion not appropriate when court did not allow briefing on issue**)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.)."

"[T]rial courts (and appellate courts as well) may raise preclusion issues sua sponte. Of course, **the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. ... Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied.** Compare *McClain v. Apodaca*, 793 F.2d 1031, 1032-1033 (9th Cir. 1986) (**sua sponte application of preclusion appropriate when district court heard evidence and gave both parties opportunity to address issue before ruling**) with *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d

1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (**sua sponte application of preclusion not appropriate when court did not allow briefing on issue**)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

Thus although the relevant cases state that "Parties must have reasonable notice and opportunity tc be heard *before* claim preclusion is applied", here the district court was in a hurry to apply claim preclusion in a totally meaningless manner, totally ignoring all the relevant case law, especially since defendants were losing, and considering defendants supposed representatives the Department of Justice too incompetent to bring up, or meet the burden of proof on, duplication of claims or claim preclusion on their own. Then again the district court judge has been acting more like the real representative for defendants anyway, replacing the supposed representatives for the Defendants, the Department of Justice, of whose professional legal competence the district court judge must have an even lower opinion than that of petitioner.

Respectfully Submitted,

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*
Plaintiff	*Civil Action No.
v.	*
	*PJM-98-4133
DONNA E. SHALALA,	*
SECRETARY DHHS	*
DR. HAROLD VARMUS,	*
DIRECTOR NIH	*
DR. RICHARD KLAUSNER,	*Filed
DIRECTOR NCI	*
Defendants	*January 28, 1999

* * * * * * * * * * * * * * * *

MEMORANDUM

The above-captioned case, filed December 21, 1998, represents plaintiff's sixth action against Donna E. Shalala, Secretary of the Department of Health and Human Services ["HHS"], Dr. Harold E. Varmus, Director of the National Institutes of Health ["NIH"], Dr. Richard Klausner, Director of the National Cancer Institute ["NCI"],[1] and various employees of the federal government,[2] claiming discrimination based on race, sex, national origin, age, retaliation, creation of a hostile work environment, breach of employment contract, and constructive discharge from plaintiff's former position within NIH.[3]

---

[1] NCI represents one of the "Institutes" within NIH.

[2] Of the several dozen federal employees named, only Secretary Shalala and Drs. Klausner and Varmus have been named as party defendants in each case.

[3] These cases include *Lukacs v. Shalala, et al.*, Civil Action No. PJM-96-2913 (dismissed November 12, 1998 and currently on appeal); *Lukacs v. Shalala, et al.*, the consolidated Civil Action Nos. PJM-97-379, PJM-97-3359, and PJM-97-3359 (dismissed September 4, 1998 and currently on appeal); and *Lukacs v. Shalala, et al.*, Civil Action No. PJM-97-3483 (voluntarily dismissed but subject to the doctrines of *res judicata* and collateral estoppel, see Order dated November 6, 1998).

Having failed to show discriminatory action on the part of his employer in the earlier cases, plaintiff now attempts to relitigate the same issues and additionally to attack policies and practices allegedly used at NIH/NCI that were not raised in prior litigation. Because plaintiff's complaints against these policies and practices could have been fully raised in the earlier litigation, and because his current complaints arose out of the subject matter of those earlier actions, the doctrine of *res judicata* precludes judicial review of both the old and the new allegations raised herein.

For that reason, as separate Order shall be entered, dismissing the complaint and closing the case.

Signature of Peter J. Messitte

_____

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

1/25/99

_____

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*
Plaintiff	*Civil Action No.
v.	*
	*PJM-98-4133
DONNA E. SHALALA,	*
SECRETARY DHHS	*
DR. HAROLD VARMUS,	*
DIRECTOR NIH	*
DR. RICHARD KLAUSNER,	*Filed
DIRECTOR NCI	*
Defendants	*January 28, 1999

* * * * * * * * * * * * * * * *

ORDER

In accordance with the foregoing Memorandum, IT IS this 25 day of January, 1999 by this Court hereby ORDERED:

1. That the above-captioned action IS DISMISSED;

2. That the Clerk of the Court CLOSE this case; and

3. That the Clerk of the Court MAIL a copy of this Order, together with the foregoing Memorandum, to plaintiff.

Signature of Peter J. Messitte

_____

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1334

FRANK PAUL LUKACS,

Plaintiff - Appellant,

versus

DONNA E. SHALALA, Secretary, Department of Health and Human Services; HAROLD E. VARMUS, Director, National Institutes of Health; RICHARD KLAUSNER, Director, National Cancer Institute,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, District Judge. (CA-98-4133-PJM)

Submitted: May 25, 1999

Decided: June 22, 1999

Before WIDENER, MURNAGHAN, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Frank Paul Lukacs, Appellant Pro Se. George Levi Russell, III, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for AppelleeS.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Frank Paul Lukacs appeals the district court's dismissal of his action as barred by res judicata. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Lukacs v. Shalala, No. CA-98-4133-PJM (D. Md. Feb. 2, 1999). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 99-1334

CA-98-4133-PJM

FRANK PAUL LUKACS

Plaintiff - Appellant,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES; HAROLD E. VARMUS, Doctor, Director, National Institutes of Health; RICHARD KLAUSNER, Doctor, Director, National Cancer Institute

Defendants - Appellees.

FILED August 31, 1999

On Petition for Rehearing

and Rehearing In Banc

Petitioner's petition for rehearing and rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

Fourteenth Amendment Equal Protection Clause of the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment Due Process Clause of the United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. §2000e-16, et seq. under Title VII of the Civil Rights Act of 1964

42 U.S.C. §2000e-16 states that "All personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on race, color, religion, sex, or national origin."

42 U.S.C. §2000e-16 states that "Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, ... an employee or applicant for employment ... may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d)

5 U.S.C. §7201 (a) states that "For the purpose of this section - (1) "underrepresentation" means a situation in which the number of members of a minority group designation (determined by the Equal Employment Opportunity Commission in consultation with the Office of Personnel Management, on the basis of the policy set forth in subsection (b) of this section) within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States, as determined under the most recent decennial or mid-decade census, or current population survey, under title 13".

5 U.S.C. §7201 (c) states that "the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable - (1) that each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service,

with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited; and (2) that the Office conduct a continuing program of (A) assistance to agencies in carrying out programs under paragraph (1) of this subsection, and (B) evaluation and oversight and such recruitment programs to determine their effectiveness in eliminating such minority underrepresentation."

5 U.S.C. §7201 (d) states that "the Equal Employment Opportunity Commission shall - (1) establish the guidelines proposed in carrying out the program required under subsection (c) of this section: and (2) make determinations of underrepresentation which are proposed to be used initially under such program; and (3) transmit to the Executive agencies involved, to the Office of Personnel Management, and to the Congress the determinations made under paragraph (2) of this subsection."

5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c)

5 C.F.R. §720.202 (a) states that "Underrepresentation means a situation in which the number of women or members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees

within the employment category than the percentage of women or the minority constitutes within the civilian labor force of the United States, in accordance with section 720.205 (c) and (d)."

5 C.F.R. §720.202 (e) states that "Recruitment means the total process by which the Federal Government and the Federal agencies locate, identify, and assist in the employment of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through programs of training, work experience, or both."

5 CFR §720.205 (c) states that "Where an agency or agency component located in a geographical area where the percentage of underrepresented groups in the area civilian labor force is higher than their percentage in the national labor force, the agency or component must base its plans on the higher level of representation in the relevant civilian labor force."

29 C.F.R. § 1614.408 Civil action: Title VII, Age Discrimination in Employment Act, and Rehabilitation Act

29 C.F.R. § 1614.408 regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances specifically states that "A complainant who has filed an individual complaint ... is authorized under Title VII, the ADEA, and the Rehabilitation Act to file a civil action in an appropriate United States District Court

Within 90 days of receipt of a final decision on an individual or class complaint if no appeal has been filed or Within 90 days of receipt of the Commission's final decision on an appeal".

Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM)

OPM Attachment 1 to FPM Letter 720-2 defines minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of

Europe.

OPM Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows: "(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. (b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

OPM Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that "in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language".

OPM Attachment 1 to FPM Letter 720-2 states that "An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex in a category of Federal employment and (b) the percentage of that same group in the civilian labor force either nationally or locally." Furthermore, "agencies need to compare both national and local", (State or standard metropolitan statistical area ("SMSA)), "civilian labor force data for each minority/sex group, and under OPM's regulations, must generally use the higher of the two percentages in making each underrepresentation determination".

OPM Attachment 1 to FPM Letter 720-2 states that "It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor data without regard to the availability of minorities and women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades".

Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA)

DHHS COTA states that "Selection Method: Through the use of the Department of Health and Human Services Training Agreement for Career Opportunities, employees who do not

meet the basic qualification requirements, as stated in the X-118 Qualification Standards, will be given the opportunity to be competitively selected for the above position."

29 C.F.R. 1614.108 Investigation of Complaints

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact finding conferences or any other fact finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of the Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation, or alternatively by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decision maker should, or the Commission on appeal may, in appropriate circumstances:

(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission may, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigations within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f), Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the

investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to section 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

42 U.S.C. §2000e-2, et seq. under Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2. Unlawful Employment Practices provides

"(a) it shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Federal Rules of Civil Procedure
Rule 15. Amended and Supplemental Pleadings.

Federal Rules of Civil Procedure Rule 15 (a) Amendments specifically states:
"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Federal Rules of Civil Procedure
Rule 42. Consolidation; Separate Trials

Federal Rules of Civil Procedure Rule 42 (a) Consolidation specifically states:
"(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in

the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

APPENDIX E

Some of the many individual elements of the United States federal government's and the National Institutes of Health's so called affirmative action or diversity programs for minorities and females and hispanics include but are not limited to such elements as the Federal Equal Opportunity Recruitment Program (FEORP); the Affirmative Employment Program (AEP); the legislation of 5 U.S.C. §7201 (a); the legislation of 5 U.S.C. §7201 (c); the legislation of 5 U.S.C. §7201 (d); the elements of 5 C.F.R. §720.202 (e), especially those referring to "qualifiable" minorities and women, namely "those who have the potential but do not presently meet valid qualification requirements", namely those minorities and women who do not have even the minimum "training, work experience, or both" for the advertised job vacancy announcements, which are discriminatory and without authority in 5 U.S.C. §7201, the statute which the regulations supposedly implement; the elements of 5 C.F.R. §720.202 (a), especially those authorizing females to also receive the benefits of so called affirmative action for minorities, which are discriminatory and without authority in 5 U.S.C. §7201, the statute which the regulations supposedly implement, and which only authorizes minorities to receive the benefits of so called affirmative action; the elements of 5

C.F.R. §720.202 (a) and the elements of 5 C.F.R. §720.205(e), especially those referring to the appropriate labor force, which is taken as the higher of the national or local minority or female labor force for the purposes of comparison, and which are discriminatory and without authority in 5 U.S.C. §7201, the statute which the regulations supposedly implement, which statute only authorizes use of the minority national labor force; the Federal Equal Opportunity Recruitment Program regulations on so called "underrepresentation", in which the "Data that is used in determining underrepresentation is (1) An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex group in a category of federal employment and (b) the percentage of that same group in the civilian labor force (either nationally or locally)" and in which "It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor force data without regard to the availability of minorities or women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades.", and the mandatory classifications on the basis of race and gender which are discriminatory; the United States Equal Employment Opportunity Commission's "Instructions for the Development

and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates"; Executive Order 11478 as amended by Executive Order 12106 which established requirements for federal agency Affirmative Employment Programs; the Office of Personnel Management classification of minorities by race and national origin under the Federal Equal Opportunity Recruitment Program, which includes everyone from every continent to receive the benefits of so called affirmative action for minorities except caucasians having origins in Europe, and which includes everyone of hispanic origin on the basis of the Spanish language or surname to also receive the benefits of so called affirmative action for minorities; the purposeful exclusion of relevant qualifications and merit from consideration for Federal Equal Opportunity Recruitment Program designated job openings in order to greatly increase the probability, to almost the point of certainty, of a minimally qualified or even a totally unqualified minority or female or hispanic to be evaluated as being highly qualified and to be selected for job openings, and to correspondingly greatly decrease the probability, to almost the point of certainty, of a much more qualified white male, especially one over forty years of age and of Hungarian origin, to be evaluated as being highly qualified and to be selected for the advertised job vacancy

announcements; the failure of federal agencies to comply with the mandatory 30 Day processing time for informal equal employment opportunity complaints, which is a violation of 29 C.F.R. §1614, and the failure of federal agencies to comply with the mandatory 180 days for completion of investigation of formal equal employment opportunity complaints, which is a violation of 29 C.F.R. §1614, with EEO complaints from white males challenging the legality and constitutionality of so called affirmative action for minorities and females and hispanics being purposefully delayed or simply intentionally not being independently processed or investigated for years precisely because they are EEO complaints from a white male complaining about so called affirmative action programs for minorities and females and hispanics, while at the same time other EEO complaints during those same years are being actively and aggressively processed and actively and aggressively investigated simply because these EEO complaints are from minorities or females or hispanics; the failure of federal agencies to seriously consider, interview, or select white males for Federal Equal Opportunity Recruitment Program designated job openings; the preferences and favoritism for minorities and women under the Federal Equal Opportunity Recruitment Program and the Affirmative Employment Program, and the creation of barriers to the selection, hiring, and promotion of white males,

especially those most qualified and over forty years of age; the Equal Employment Opportunity Commission's (EEOC) responsibility to establish and maintain discriminatory affirmative action programs for minorities and females, and their dual mutually exclusive functions to ensure real equal employment opportunity regardless of race or sex or national origin or age, which represent a conflict of interest and have the appearance of partiality, prejudice, and bias, and which are discriminatory against caucasian males; the federal government officials' responsibilities to establish and maintain discriminatory affirmative action programs for minorities and females, and their dual mutually exclusive functions to ensure real equal employment opportunity regardless of race or sex or national origin or age, which represent a conflict of interest and have the appearance of partiality, prejudice, and bias, and which are discriminatory against caucasian males; the Federal Equal Opportunity Recruitment Program and Affirmative Employment Program requirement for the justification and approval of the selection of the best qualified white male, but not for the selection of even minimally qualified or even totally unqualified minorities and females; the mandatory classification of applicants and candidates for job vacancy announcements by race and gender, and especially such mandatory classifications by race and gender by none

other than the selecting official as the selecting official interviews the applicants and candidates; the selection by the FEORP Operations Coordinator under the Federal Equal Opportunity Recruitment Program (FEORP) of Qualifications Review Board (QRB) members, who evaluate and refer eligible candidates for selection, who are themselves minorities and women, and who promote the selection of minorities and women and the nonselection of white males; the violation of the requirement to rank or group candidates and refer only a reasonable number (normally 3 to 5) of the best qualified candidates for selection, [and in fact in two job vacancy announcements herein cited referring a total of sixty two and sixty nine supposedly "best qualified" candidates to the selecting official], in order to give preference and favoritism to minimally qualified minorities and females, which is discriminatory against best qualified white males; and the Career Opportunities Training Program ("COTA"), and "STRIDE, START, and ACCESS", in which minority and female and hispanic "employees who do not meet the basic qualifications requirements as found in the Qualifications Standards Handbook", in other words minorities and females and hispanics who are not just minimally qualified but who are in fact totally unqualified for the job vacancy announcement, "will be given the opportunity to be competitively selected and trained for the position", which means that

these totally unqualified people will only compete with other totally unqualified people and will be selected and hired anyway for the job vacancy announcement for which they are totally unqualified as so called "trainees", rather than white males who are already highly qualified for the position, [which is precisely what happened to plaintiff-appellant in one job vacancy announcement], and then after being hired and while receiving a full salary they will be so called "trained" for the duties and responsibilities of the positions which they cannot perform but for which positions they have already been hired."

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*May 14, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*August 18, 1997
	*Civil Action #
v.	*PJM-97-379
	*
DONNA E. SHALALA, et al.	*January 09, 1998
	*Civil Action #s
Defendants	*PJM-97-3359
	*PJM-97-3483
* * * * * * * * * * * * * * *	*PJM-97-3495

MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

OR IN THE ALTERNATIVE MOTION TO ISSUE A DECISION FULLY OR PARTIALLY IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO EXCLUDE ALL EVIDENCE OFFERED BY DEFENDANTS FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29

C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO CONSIDER THE MATTERS TO WHICH THE INFORMATION OR TESTIMONY OF PLAINTIFF'S EEO COMPLAINTS PERTAINS TO BE ESTABLISHED IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO DRAW AN ADVERSE INFERENCE THAT THE INFORMATION, OR ANY TESTIMONY OF DEFENDANTS, FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 WOULD HAVE REFLECTED UNFAVORABLY ON DEFENDANTS WHO REFUSED TO PROVIDE THE INFORMATION WHICH WOULD HAVE RESULTED FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614, AND WHICH INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 DEFENDANTS DID NOT COMPLETE WITHIN THE MANDATORY 180 DAYS, AND IN FACT WHICH INVESTIGATION DEFENDANTS EVEN YEARS LATER HAVE PURPOSEFULLY AND INTENTIONALLY NEVER EVEN BEGUN BECAUSE THEY WERE EEO COMPLAINTS FROM A WHITE MALE AGAINST AFFIRMATIVE ACTION FOR MINORITIES AND FEMALES AND HISPANICS,

AND, OR IN THE ALTERNATIVE, FOR DEFENDANTS TO

PAY FOR THE ENTIRE COSTS OF DISCOVERY BY A COURT APPOINTED ATTORNEY OR A PRACTICING ATTORNEY OF PLAINTIFF'S CHOICE OF ALL OF PLAINTIFF'S EEO COMPLAINTS PRESENTLY BEFORE THIS FEDERAL COURT AND UPON WHICH DEFENDANTS HAVE NOT COMPLETED THE REQUIRED AND MANDATORY INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 TO "DEVELOP A COMPLETE AND IMPARTIAL FACTUAL RECORD UPON WHICH TO MAKE FINDINGS ON THE MATTERS RAISED BY THE WRITTEN COMPLAINT" AND TO "EFFICIENTLY AND THOROUGHLY ADDRESS THE MATTERS AT ISSUE"

Now comes the Plaintiff and moves for this court to issue a decision fully or partially in favor of Plaintiff for Defendants failure to perform an investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614, and, or in the alternative, motion to exclude all evidence offered by Defendants for Defendants failure to perform an investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614, and, or in the alternative, motion to consider the matters to which the information or testimony of Plaintiff's EEO complaints pertains to be established in favor of Plaintiff for Defendants failure to perform an investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614, and, or in the alternative, motion to draw an adverse inference that the information or any testimony of Defendants

from the investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614 would have reflected unfavorably on Defendants who refused to provide the information which would have resulted from the investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614 and which investigation of Plaintiffs EEO complaints according to 29 C.F.R. § 1614 Defendants did not complete within the mandatory 180 days and in fact which investigation Defendants even years later have purposefully and intentionally never even begun because they were EEO complaints from a white male against affirmative action for minorities and females and hispanics, and, or in the alternative, for Defendants to pay for the entire costs of discovery by either a court appointed attorney or a practicing attorney of Plaintiff's choice of all of Plaintiff's EEO complaints presently before this federal court and upon which Defendants have not completed the required and mandatory investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614 to "develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint" and to "efficiently and thoroughly address the matters at issue".

The reasons for these motions are set forth in the accompanying memorandum.

Respectfully Submitted,

Frank Paul Lukacs, J.D., M.B.A.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*May 14, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*August 18, 1997
	*Civil Action #
v.	*PJM-97-379
	*
DONNA E. SHALALA, et al.	*January 09, 1998
	*Civil Action #s
Defendants	*PJM-97-3359
	*PJM-97-3483
* * * * * * * * * * * * * * *	*PJM-97-3495

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

AND, OR IN THE ALTERNATIVE, MOTION TO ISSUE A DECISION FULLY OR PARTIALLY IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO EXCLUDE ALL EVIDENCE OFFERED BY DEFENDANTS FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION

OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO CONSIDER THE MATTERS TO WHICH THE INFORMATION OR TESTIMONY OF PLAINTIFF'S EEO COMPLAINTS PERTAINS TO BE ESTABLISHED IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO DRAW AN ADVERSE INFERENCE THAT THE INFORMATION, OR ANY TESTIMONY OF DEFENDANTS, FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 WOULD HAVE REFLECTED UNFAVORABLY ON DEFENDANTS WHO REFUSED TO PROVIDE THE INFORMATION WHICH WOULD HAVE RESULTED FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614, AND WHICH INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 DEFENDANTS DID NOT COMPLETE WITHIN THE MANDATORY 180 DAYS, AND IN FACT WHICH INVESTIGATION DEFENDANTS EVEN YEARS LATER HAVE PURPOSEFULLY AND INTENTIONALLY NEVER EVEN BEGUN BECAUSE THEY WERE EEO COMPLAINTS FROM A WHITE MALE AGAINST AFFIRMATIVE ACTION FOR MINORITIES AND FEMALES AND HISPANICS,

AND, OR IN THE ALTERNATIVE, FOR DEFENDANTS TO PAY FOR THE ENTIRE COSTS OF DISCOVERY BY A COURT APPOINTED ATTORNEY OR A PRACTICING ATTORNEY OF PLAINTIFF'S CHOICE OF ALL OF PLAINTIFF'S EEO COMPLAINTS PRESENTLY BEFORE THIS FEDERAL COURT AND UPON WHICH DEFENDANTS HAVE NOT COMPLETED THE REQUIRED AND MANDATORY INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 TO "DEVELOP A COMPLETE AND IMPARTIAL FACTUAL RECORD UPON WHICH TO MAKE FINDINGS ON THE MATTERS RAISED BY THE WRITTEN COMPLAINT" AND TO "EFFICIENTLY AND THOROUGHLY ADDRESS THE MATTERS AT ISSUE"

"Federal statute 29 C.F.R. §1614.108, sections (e) and (f), specifically state that:

"the agency shall complete its investigation within 180 days of the date of filing of an individual complaint" ... "within 180 days from the filing of the complaint, ... the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to section 1614.110 from the agency with which the complaint was filed."

Defendants intentionally and purposefully violated federal statute 29 C.F.R. §1614.108, sections (e) and (f)."

The Code of Federal Regulations, as per 29 C.F.R. §1614.108 Investigation of Complaints specifically states that: **"(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed."** (with no additional requirement as Defendants would have this court erroneously believe). 29 C.F.R. § 1614.108 continues with **"(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint."** (with the point being that the agency is first supposed to develop a complete and impartial factual record upon which to make findings, rather than as Defendants have consistently done to Plaintiff made their findings and decisions before there was any factual record upon which to make a finding, much less a complete and impartial factual record upon which to make their findings, and what Defendants would now like to do in federal court so that a judge make his findings and decisions before there is a complete and impartial factual record upon which to make the findings and decisions). 29 C.F.R. §

1614.108 (b) continues with **"Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact finding conferences or any other fact finding methods that efficiently and thoroughly address the matters at issue"** (any of which fact finding methods was precisely what Defendants wanted to avoid for they knew that the fact finding would merely produce evidence in Plaintiff's favor, and so Defendants purposefully decided that if that was going to be the end result anyway, that they would rather not do any of the mandatory fact finding at all).

29 C.F.R. § 1614.108 (c) continues with **"The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:**

(1) The complainant, the agency, and any employee of the Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation, or alternatively by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the

attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate."

Plaintiff's only comment at this point, given subsection (3) above, is what should be the appropriate remedy, using the words of subsection (3) above "When the agency against which a complaint is filed, or its employees fail without good cause shown to" ever process or investigate an EEO complaint "fully and in timely fashion" and intentionally refuses to produce any "documents, records, comparative data, statistics, affidavits, or the attendance of witness(es)"? Should the federal court now to use the words of

subsection (3) above

"(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party"?

Obviously, rather than granting defendants' motion to dismiss or in the alternative motion for summary judgment, Plaintiff sincerely believes that real justice requires that any or all of the above enumerated consequences of Defendants purposeful actions in failing to process Plaintiff's EEO complaints or to conduct the mandatory independent investigations should apply, and Plaintiff hereby formally requests such remedies, which is realistically the only way that Defendants will ever process EEO complaints and conduct independent investigations of EEO complaints by white males against elements of affirmative action.

29 C.F.R. § 1614.108 (d) continues with "Any investigation will be conducted by investigators with appropriate security

clearances. The Commission may, upon request, supply the agency with the name of an investigator with appropriate security clearances."

29 C.F.R. § 1614.108 (d) continues with the all important rule which has been consistently violated by Defendants in that **"(e) The agency shall complete its investigations within 180 days of the date of filing of an individual complaint"**. This section alone is dispositive, and contrary to Defendants attempts at trying to deceive the court into believing that there is some additional magical or mystical requirement, the section speaks for itself in that **"(e) The agency shall complete its investigations within 180 days of the date of filing of an individual complaint"**, period!

We are not just talking about missing this 180 day deadline by perhaps a day or two, but as Plaintiff has stated in his complaint we are talking about **"To date, almost five years later, which is almost ten times the mandatory 180 day federal deadline for completing investigations, an investigation by DHHS has not even begun much less been completed with respect to said formal complaints.**". In addition we are not just talking about Defendants having accidentally missed this mandatory independent investigation deadline date maybe once or twice, but we are talking about Defendants

intentionally and purposefully not even beginning any of these mandatory independent investigations on dozens of Plaintiff's EEO complaints. And why, simply because he is a white male complaining about being harmed and injured by so called affirmative action programs, programs which let us not forget those responsible for initiating and maintaining such so called affirmative action programs, are also the ones responsible for processing Plaintiff's EEO complaints against so called affirmative action programs, and are also the ones responsible for ordering that the mandatory independent investigations of such EEO complaints should begin, not to mention actually be completed, within the required statutory period of 180 days.

What really galls Plaintiff in all of this is that first Defendants simply refuse to do any of the mandatory independent investigations, especially since they knew or should have known that these mandatory independent investigations would have produced evidence in Plaintiff's favor, and now through no less than the so called justice department who should themselves be investigating the complete absence of any of the mandatory independent investigations, seek a motion to dismiss or in the alternative motion for summary judgement, precisely to now avoid Plaintiff having even the opportunity to have any depositions or discovery to prove his case on the merits and introduce the very evidence

which Defendants should have provided to Plaintiff during the mandatory independent investigations. Unfortunately, the end result of granting the motion to dismiss or in the alternative motion for summary judgement would be precisely to reward Defendants for their inappropriate and illegal behavior, for from now on Defendants would know that any time they didn't want to do the mandatory independent investigation because the results would not be in their favor, they would simply not do any of the required mandatory independent investigations, much less within the required statutory period of 180 days, and that future prospective Plaintiffs would never have even any opportunity at depositions and discovery to produce the evidence and prove their case on the merits. That perhaps unintended but foreseeable result would most certainly be a miscarriage of justice. ...

Plaintiff filed EEO complaints, and in effect by not processing and independently investigating his EEO complaints, and especially by not providing Plaintiff "with a copy of the investigative file", which would contain "a complete and impartial factual record", Defendants could in effect continue the discriminatory so called affirmative action practices and discriminatory ultimate adverse employment decisions resulting from affirmative action, which is one of the real, although nonlegitimate, and definitely

discriminatory, reasons why there was no processing or independent investigation of Plaintiffs complaints dealing with so called affirmative action in the first place.

Plaintiff's EEO complaints being from a white male against affirmative action were purposefully being "delayed" or simply intentionally not being independently investigated or processed for years and years and years and years and years precisely because they were EEO complaints from a white male against affirmative action, while at the same time other EEO complaints during those same five years were being actively and aggressively investigated and actively and aggressively processed simply because these EEO complaints were from minorities or females and hispanics. ...

(Please also note in exhibit "R", from OEO, NIH, DHHS, that it is none other than Plaintiff's employer who is making the decision to (or not to) process and to (or not to) order an independent investigation according to 29 C.F.R § 1614, contrary to the fact situation of the 1990 case of Young v. Sullivan, although from the case itself "Title VII provides a former employee a remedy against his or her employer" and "Plaintiff does allege that he was employed by NIH DHHS", and as per the seemingly innocuous, but in fact all important, paragraph which states

that "Please be advised that this complaint is being processed pursuant to the provisions of Title 29 Code of Federal Regulations (CFR) Section 1614 which became effective October 1, 1992. Under these regulations you will be issued an investigative file along with an investigative summary.", it becomes obvious that the 1990 case of Young v. Sullivan was decided before "Title 29 Code of Federal Regulations (CFR) Section 1614 became effective October 1, 1992". Thus, Title VII does now create a cause of action for discrimination in the processing and investigation of EEO complaints since this is now a "term, condition, or privilege of employment".) ...

"Once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship. [FN5] In the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace. The contractual relationship of employment triggers the provision of Title VII governing "terms, conditions, or privileges of employment." Title VII in turn forbids discrimination on the basis of "race, color,

religion, sex, or national origin."" Hishon v. King & Spalding, 467 U.S. 69, at 73 (1984). ...

"Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term, condition, or privilege of employment. An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), [FN7] or that form "an aspect of the relationship between the employer and employees," Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971), [FN8] may not be afforded in a manner contrary to Title VII." Hishon v. King & Spalding, 467 U.S. 69, at 75-76 (1984). ...

The reality of the situation is that a

benefit is being conferred by the government upon federal government employees who are minorities and women and hispanics and asians, but that same benefit is being denied by the government to federal government employees who are white males. In this there is supposedly no harm. Complainant maintains that the amount of the benefit being given to minorities and women and hispanics and asians and at the same time being denied to white males is precisely the amount of the loss and harm and injury. Furthermore, if the benefit that is conferred upon minorities and women and hispanics and asians is regarded as a term, privilege, or condition of employment, for that is the precisely the way that the benefit was conferred initially, then the denial of that same benefit to white males is most certainly to be regarded as a term, privilege, or condition of employment. ...

Thus, outside of the issue of the untimely processing of Plaintiff's EEO complaints as a separate and independent claim in the present federal court case, the facts of the untimely processing of Plaintiff's EEO complaints should remain and be considered as additional evidence of the intentional discrimination, and the intentional cover up and whitewash and obstruction of justice, on the part of the agency simply because

Plaintiff's EEO complaints were by a white male complaining about so called affirmative action programs, and the offices which were supposed to be timely processing and ordering an independent investigation had been themselves delegated the responsibility of initiating and maintaining and fully supporting more and more and ever larger and larger affirmative action programs for minorities and females, and therefore these offices simply refused to do anything about EEO complaints by this white male complaining precisely of those discriminatory practices which they themselves were initiating and maintaining and fully supporting. ...

Plaintiff's EEO complaints being from a white male against affirmative action were purposefully being "delayed" or simply intentionally not being independently investigated or processed for years and years and years and years and years precisely because they were EEO complaints from a white male against affirmative action, while at the same time other EEO complaints during those same five years were being actively and aggressively investigated and actively and aggressively processed simply because these EEO complaints were from minorities or females and hispanics. ...

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK PAUL LUKACS	*	
Plaintiff	*	June 10, 1997
v.	*	Civil Action #
DONNA E. SHALALA, et al.	*	PJM 96-2913
Defendants	*	

PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves for leave to supplement his memorandum in opposition to defendants' motion to dismiss or in the alternative for summary judgment with the attached affidavit of Plaintiff according to Rule 56 (f) of the Federal Rules of Civil Procedure.

Rule 56 (f) of the Federal Rules of Civil Procedure states, "When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Since Defendants have purposefully and intentionally refused to conduct the mandatory investigation as codified in 29 C.F.R. § 1614 on Plaintiff's sixth and seventh and tenth and nineteenth and twenty ninth and thirty first and thirty eighth EEO complaints which are presently before this federal court and which would have presented by affidavit facts essential to justify Plaintiff's opposition, and since the requirements according to Rule 26 (d) of the Federal Rules of Civil Procedure "Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)." have not yet been met, there have been no "depositions, answers to interrogatories, and admissions on file," with with to designate

"specific facts showing that there is a genuine issue for trial".

As the Supreme Court itself has stated in Celotex Corporation v. Catrett, 477 U.S. 316 (1986), "In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file."" Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986). Unfortunately, here there have been no "depositions, answers to interrogatories, and admissions on file". The Supreme Court further continues in the next sentence with "Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56 (e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial". Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986). In this case where there are no "depositions, answers to interrogatories, and admissions on file" with which Plaintiff can designate "specific facts showing that there is a genuine issue for trial", Plaintiff is left with merely his own "affidavit" or

declaration to designate "specific facts showing that there is a genuine issue for trial". **The Supreme Court in the next sentence continues with "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986).** The Supreme Court continues in the next sentence with "Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56 (e) permits a proper summary judgment to be opposed by any of the kinds of evidentiary materials listed in Rule 56 (c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986). The Supreme Court continued later with "The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), [FN6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery. FN6. **Rule 56(f) provides: Should it appear from the affidavits of a party opposing the motion that he cannot for**

reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Celotex Corporation v. Catrett, 477 U.S. at 326-327.

WHEREFORE, Plaintiff respectfully requests that the court enter an order permitting Plaintiff leave to supplement his memorandum in opposition to defendants motion to dismiss or in the alternative motion for summary judgment with the attached affidavit of Plaintiff according to Rule 56 (f) of the Federal Rules of Civil Procedure.

Respectfully Submitted,

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
Clean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK PAUL LUKACS	
Plaintiff	June 10, 1997
v.	Civil Action #
DONNA E. SHALALA, et al.	PJM 96-2913
Defendants	

AFFIDAVIT OF PLAINTIFF

I, Frank Paul Lukacs, being duly sworn in accordance with law do hereby state and depose the following:

I have personal knowledge of the facts contained in this declaration which are true and correct to the best of my knowledge, information, and belief.

1. There has been no discovery to date since there has not been a scheduling conference held to date, and thus I have not

been able to secure depositions, answers to interrogatories, or admissions on file with with to designate specific facts showing that there is a genuine issue for trial or sufficient facts that would permit me to oppose the motion for summary judgment.

2. The agency has not conducted the mandatory investigations on my sixth and seventh and tenth and nineteenth and twenty ninth and thirty first and thirty eighth EEO complaints which are presently before this federal court which would have presented by affidavit facts essential to justify my opposition to defendants motion for summary judgment.

I, Frank Paul Lukacs, hereby declare, under the penalty of perjury, that the foregoing is true and correct.

Executed on June 10, 1997.

Respectfully submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff, Pro Se

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*June 18, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*January 26, 1998
	*Civil Action #
v.	*PJM-97-3483
	*
DONNA E. SHALALA, et al.	*January 26, 1998
	*Civil Action #
Defendants	*PJM-97-3495
	*
* * * * * * * * * * * * * * *	

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION ACCORDING TO F.R.C.P. RULE 65,
OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT ACCORDING TO F.R.C.P. RULE 57,
OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT ACCORDING TO F.R.C.P. RULE 56,
ON THE FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent

injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the federal government Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Plaintiff further seeks to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), programs of the United States federal government, including but not limited to: The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c); the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender and National Origin, including but not limited to, Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women,

Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, and Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force; the Equal Employment Opportunity Commission's Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the Federal Equal Opportunity Recruitment Program FEORP and the Affirmative Employment Program AEP; the Failure of the United States Government to Seriously Consider, Interview, or Select White Males for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; the Exclusion of Relevant Qualifications from Consideration for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; and the Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program FEORP.

The reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

Frank Paul Lukacs

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*June 18, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*January 26, 1998
	*Civil Action #
v.	*PJM-97-3483
	*
DONNA E. SHALALA, et al.	*January 26, 1998
	*Civil Action #
Defendants	*PJM-97-3495
	*
* * * * * * * * * * * * * * *	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION ACCORDING TO F.R.C.P. RULE 65, OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT ACCORDING TO F.R.C.P. RULE 57, OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT ACCORDING TO F.R.C.P. RULE 56, ON THE FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

DECLARATORY JUDGMENT

PARTIAL SUMMARY JUDGMENT

The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c), the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program, and the Affirmative Employment Program, Employ Racial Classifications and Gender Classifications and National Origin Classifications, and When Subjected to and Analyzed under Strict Scrutiny are Not Narrowly Tailored and Do Not Further Compelling Government Interests, and Therefore Violate the Fourteenth Amendment Equal Protection Clause of the United States Constitution and Therefore Violate the Fifth Amendment Due Process Clause of the United States Constitution ...

Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women, are Discriminatory and Without Authority in 5 U.S.C. §7201, the Statute which the Regulations Supposedly Implement ...

Furthermore, 5 C.F.R. §720.202 (e) itself states that:

"**Recruitment** means the total process by which the Federal Government and the Federal agencies locate, identify, and assist in the employment of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It **is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through programs of training, work experience, or both.**"

Thus in effect the traditional definition of a more limited recruitment program through an inappropriate redefinition of the very word recruitment now includes the total process of every conceivable assistance and preference and favoritism to the selection and employment of minorities and women, with no foreseeable limitations or boundaries, and in effect has moved from its supposedly harmless temporary remedy basis of justification to a very harmful and discriminatory permanent system of hiring and promoting minorities and women at the direct expense of old white males. Thus affirmative action for minorities and women has become negative action against white

males.

Thus there are special affirmative action programs for totally unqualified minorities and women such as the Career Opportunity Training Agreement (COTA), upward mobility, Stride, and management intern programs. In particular COTA has a self described recruiting and selection method which states that:

"Selection Method: Through the use of the Department of Health and Human Services Training Agreement for Career Opportunities, employees who do not meet the basic qualification requirements, as stated in the X-118 Qualification Standards, will be given the opportunity to be competitively selected for the above position."

Thus through COTA minorities and women who do not meet even the minimum basic qualification requirements, as is specifically published in the OPM book entitled X-118 Qualification Standards, by so called competition restricted to those minorities and women who are totally unqualified, must nevertheless be hired over Plaintiff, or euphemistically given the opportunity to be selected as so called "trainees", must receive priority training over Plaintiff, and must be promoted over Plaintiff. Plaintiff as a highly qualified old white male is harmed by the discriminatory hiring, training, and promotion of such totally unqualified minority

and female "trainees" for positions for which plaintiff who surpasses the basic qualification requirements can not and is not even considered.

Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, are Discriminatory and Without Authority in 5 U.S.C. §7201, the Statute which the Regulations Supposedly Implement ...

Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force, are Discriminatory and Without Authority in 5 U.S.C. §7201, the Statute which the Regulations Supposedly Implement ...

The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender are Discriminatory ...

The OPM regulations state that: **"An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex in a category of Federal employment and (b) the percentage of that same group in the civilian labor force either nationally or locally."** (See Attachment 1 to FPM Letter 720-2.) Furthermore, "agencies need to compare both national and local", (State or standard metropolitan

statistical area ("SMSA)), "civilian labor force data for each minority/sex group, and under OPM's regulations, must generally use the higher of the two percentages in making each underrepresentation determination". Id.

Thus once an agency determines that minority/female underrepresentation exists in a given position, that agency is required by OPM regulations to develop a Federal Equal Opportunity Recruitment Program ("FEORP") plan and an Affirmative Employment Program ("AEP") plan. Agencies have the responsibility to continue FEORP efforts until underrepresentation is eliminated.

The OPM Attachment 1 to FPM Letter 720-2, in addition to being an impermissible broad racial classification and an impermissible broad gender classification, improperly discriminates against the Plaintiff, a white male, by utilizing the wrong comparison for determining underrepresentation. Although plaintiff maintains that there should be no mandatory FEORP and no mandatory AEP at all, for they are merely thinly disguised quotas, in the alternative, plaintiff submits that a more appropriate comparison might be the percentage of a particular minority/sex group in a category of Federal government employment versus the percentage of that same minority/sex group in the same category of employment in the civilian labor force. The distinction in plain terms is that the percentage of minority/women contract

specialists in DHHS should be compared to the percentage of minority/women contract specialists in the civilian labor force, and not to the percentage of minority/women in the civilian labor force.

The more meaningful comparison identified directly above recognizes that the minority/sex groups at issue in this proceeding must be compared with their counterparts in the civilian labor force who have the requisite knowledge, skills and abilities to perform these tasks. This obviously makes a big difference into whether or not there is even any so called underrepresentation when one considers the facts and reality. Black males are only 3.64% of the GS-1102 contract specialist area civilian labor force, but are 9.9% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, black males are actually overrepresented by a factor of three to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. Similarly black females are only 3.13% of the GS-1102 contract specialist area civilian labor force, but are 14.4% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, black females are actually overrepresented by a factor of over three to one in the agency labor force as compared to the area civilian

labor force in the GS-1102 contract specialist series. White females are 26.57% of the GS-1102 contract specialist area civilian labor force, but are 44.2% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, white females are actually overrepresented by a factor of almost five to three in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. White males are 60.44% of the GS-1102 contract specialist area civilian labor force, but are only 28.1% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, white males are actually underrepresented by a factor of two to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. Thus although 60.44% of the selections made in the agency should be white males, because of the discrimination of affirmative action for minorities and females and the negative action against white males, in a typical year only 14% of the selections made in the agency are white males.

To substantiate the allegation that the present OPM Attachment 1 to FPM Letter 720-2 comparison is meaningless and discriminatory, Plaintiff submits the OPM guidelines themselves which specifically state that:

"It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor data without regard to the availability of minorities and women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades" (emphasis added). See Attachment 1 to FPM Letter 720 - 2.

Thus, persons who do not meet anywhere near even the minimum job requirements, as established in the job vacancy announcements, are not only to be considered in the very definition of underrepresentation, but through the various FEORP and AEP plans are not only wrongfully permitted to be considered for job vacancies, but are actually in effect selected for such positions. Through the various DHHS and NIH affirmative action programs, persons unqualified for the positions identified in this civil suit were in fact both encouraged to apply for, and were in fact actually interviewed for these positions, to the detriment of the Plaintiff. Further, OPM recognized minorities or women were in fact selected as "trainees" for positions, or for comparable openings which were specifically created simultaneously and concurrently, in the eventuality that older white males such as Plaintiff would be rated the most highly qualified on the job openings, and because of that the job vacancies would have to be canceled just so that minorities and women

would nevertheless be selected.

Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program Is Discriminatory ...

OPM guidelines define minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of Europe. See Attachment 1 to FPM Letter 720-2.

Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows:

"(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. (b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the

black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that:
"in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language". The FPM Letter provides no basis for its varying definition of Hispanic origin within the 50 states.

City of Richmond v. J.A. Croson Company ...

"When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. Hazelwood School District v. United States, 433 U.S. at 308, n. 13, 97 S.Ct. at 2742 n. 13." (City of Richmond v. J.A. Croson Company, 488 U.S. at 501-502, 109 S.Ct. at 725-726.)

"Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory

exclusion must be the number of minorities qualified to undertake the particular task. See Hazelwood School District v. United States, 433 U.S. at 308, 97 S.Ct. at 2741; Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 651-652, 107 S.Ct. 1442, 1462, 94 L.Ed.2d 615 (1987)." (City of Richmond v. J.A. Croson Company, 488 U.S. at 501-502, 109 S.Ct. at 725-726.)

"To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ... There is absolutely no evidence of past discrimination against Spanish speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. ... The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination. ... The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See Wygant v. Jackson

Board of Education, 476 U.S., at 284, n. 13, 106 S.Ct. at 1852 n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days, "Fullilove", 96 Yale L.J. 453, at 482 ("Such programs leave one with the sense that racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination")." (City of Richmond v. J. A. Croson Company, 488 U.S. at 506-507, 109 S.Ct. at 728-729.)

Relevant Cases Before Adarand ...

WHITE MALE: RACE AND GENDER ...

Adarand Constructors, Inc. v. Pena ...

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal footing." General Contractors v. Jacksonville, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., at ---, 113 S.Ct.,

at 2303. Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2104-2106. ...

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2110-2112. ...

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2112-2114. ...

RELEVANT CASE LAW SINCE ADARAND ...

CONCLUSION

The statutes of 5 U.S.C. §7201 (d), 5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), the regulations of 5 C.F.R. §720 et seq, Attachment 1 to FPM Letter 720-2, the Federal Equal Opportunity Recruitment Program rules

and guidelines, and the Affirmative Employment Program rules and guidelines, all employ racial classifications and gender classifications and national origin classifications, they therefore should be subject to strict scrutiny. Consequently, the above described laws, regulations, rules, guidelines, and programs employing racial classifications and gender classifications and national origin classifications must be analyzed by this federal court under strict scrutiny. Because the United States is a country of free people whose institutions are founded upon of doctrine of equality, people can be treated differently due to their race or gender or national origin only for the most compelling reasons. Such laws, regulations, rules, guidelines, and programs are constitutional "only if they are narrowly tailored measures that further compelling governmental interests." Because these laws, regulations, rules, guidelines and programs for affirmative action employ racial classifications and gender classifications and national origin classifications which when subjected to and analyzed under strict scrutiny are not narrowly tailored measures that further compelling government interests, they violate the Fourteenth Amendment Equal Protection Clause of the United States Constitution and the Fifth Amendment Due Process Clause of the United States Constitution.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK PAUL LUKACS	*	
Plaintiff	*	Civil NO.
v.	*	PJM 96-2913
DONNA E. SHALALA, et al.	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

By letter orders dated June 3 and June 11, 1997, Magistrate Judge Connelly issued certain rulings with regard to pending motions in the captioned case.

Plaintiff Lukacs has filed objections to those rulings. Having considered those objections, the Court finds the rulings not to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

Accordingly, the said objections are hereby OVERRULED and the ORDER is hereby RATIFIED and AFFIRMED.

The Court notes that several motions have been filed in this case. The main motion which the Court intends to consider is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment. The Court in this present Memorandum Opinion has ratified and affirmed the orders of Judge Connelly of June 3 and June 11.

In order to clear a path for consideration of the Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, other than that motion, all other motions presently pending and not ruled upon are hereby DENIED WITHOUT PREJUDICE. To the extend that this case survives the Motion to Dismiss or Summary Judgment and to the extend that the substance of any motions presently denied are not otherwise covered in the Court's ruling on the Motion to Dismiss or for Summary Judgment, they may be revived following the Court's ruling.

In the meantime, the parties are directed to file no further motions until the Court is able to deal with the said Motion to Dismiss or in the Alternative for Summary Judgment.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

June 30, 1997

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1490

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Writ of Mandamus.
(CA-96-2913-PJM)

Submitted: May 14, 1998
Decided: May 27, 1998

Before WIDENER and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Frank Paul Lukacs, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Frank Paul Lukacs filed a petition for a writ of mandamus requesting that this court order the district court: (1) to vacate three of its orders; (2) to permit Lukacs to file pleadings, motions, affidavits, and appeals; (3) to reevaluate his motion for injunctive relief in light of the factors enumerated in Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195-96 (4th Cir. 1977); (4) to specify the court's reasons for denying the motion for injunctive relief; and (5) to grant his motion for permanent injunction against the federal government's affirmative action program. Lukacs raised these issues on appeal and this Court denied relief. See Lukacs v. Shalala, No. 97-2047 (4th Cir. Jan. 26, 1998) (unpublished). In this mandamus petition, Lukacs failed to establish that he has a clear right to the relief sought and that no other remedy is adequate. See In re First Fed. Sav. & Loan Ass'n, 860 F.2d 135, 138 (4th Cir. 1988). Further, mandamus may not be used as a substitute for appeal. See In re United States Steelworkers, 595 F.2d 958, 960 (4th Cir. 1979). We therefore deny Lukacs's petition for a writ of mandamus. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed August 10, 1998
No. 98-1490
CA-96-2913-PJM

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor

CLERK

EXHIBIT O

Docket Number 98-726

In The

SUPREME COURT OF THE UNITED STATES

October Term 1998

In Re FRANK PAUL LUKACS,

Petitioner

On Petition for Writ of Mandamus to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF MANDAMUS

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825
Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, does a district court have the power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure, or dismissing and refusing to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP?

II. Did the district court abuse its discretion in denying appellant's motion for a preliminary and permanent injunction on the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP), which is the federal government's so called affirmative action program for minorities and females and hispanics, without ever conducting the appropriate inquiry and analysis and review of the factors regarding motions for injunctive relief of *Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189, 195-96 (4th Cir. 1977), as required in the Fourth Circuit, and without complying with the Federal Rules of Civil Procedure Rule 52(a) which specifically states that "and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action".

APPENDIX P

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

December 7, 1998

Mr. Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143

Re: In Re Frank Paul Lukacs
No. 98-726

Dear Mr. Lukacs:

The Court today entered the following order in the above entitled case:

The petition for a writ of mandamus is denied.

Sincerely,

William K. Suter, Clerk

APPENDIX Q

In re HALLIBURTON COMPANY, Petitioner.
Misc. No. 371.
United States Court of Appeals, Federal Circuit.
March 12, 1993.
S.D. Tex.
VACATED.

Before ARCHER, Circuit Judge, BENNETT, Senior Circuit Judge, and MICHEL, Circuit Judge.
ON PETITION FOR WRIT OF MANDAMUS.

MICHEL, Circuit Judge.
ORDER
1 Halliburton Company petitions for a writ of mandamus directing the United States District Court for the Southern District of Texas to vacate its March 4, 1993 order. Louis J. Wardlaw, III and Joe A. Young oppose.

This matter stems from Wardlaw and Young's patent infringement suit against Halliburton. Following a jury trial, the jury returned a verdict that Wardlaw and Young's patent was not invalid, and Halliburton infringed certain claims of the patent, and that the infringement was willful. The court awarded treble damages and attorney fees and judgment was entered on February 26, 1993.

Halliburton filed a Fed.R.Civ.P. 59(e) motion to alter or amend the judgment.

Halliburton states that it intended to file additional post judgment motions also. The time limit for any party to file any post judgment-motions is March 15, 1993. On March 4, 1993, the district court denied Halliburton's R. 59(e) motion and further ordered that:

"No party in this case file anything further before this Court. The Court will not grant, and is not interested in considering motions to amend judgment, motions for judgment notwithstanding the verdict, motions for a new trial, or any other sorts of motions. The Court is in complete agreement with the substance of the jury verdict, and has ruled regarding all remaining issues in the case. The cost issue has been resolved. This Court must now turn its attention to the some 550 other civil disputes, and more than 40 criminal cases, presently pending on one of the largest dockets in the Country. None of the foregoing filings are required for proper appellate scrutiny, and the filing of anything further in this Court, in the absence of the exhaustion of such appellate scrutiny, will constitute an act of contempt, for which appropriate sanctions will issue."

As Halliburton points out, the Federal Rules of Civil Procedure permit any party to file timely post-judgment motions. Further, this court has stated that the failure to file certain post-judgment motions will result in limited appellate review. *Biodex Corp. v.*

Loredan Biomedical, Inc., 946 F.2d 850, 862 (Fed.Cir. 1992)("Biodex's failure to present the district court with a post-verdict motion precluded appellate review of the sufficiency of the evidence.") Wardlaw and Young's argument that Halliburton filed a lengthy addendum to its proposed judgment does not negate Halliburton's right to file any post-judgment motions authorized by the rules.

Mandamus has traditionally been used to confine a trial court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Gulfstream Aerospace Corp. v. Mayacamas*, 485 U.S. 271, 289 (1988). For example, mandamus has been granted to compel a district court to accept the filing of a motion to extend the time to appeal, *Merritt v. Broglin*, 841 F.2d 184 (7th Cir. 1988), to compel a district court to consider a motion for leave to amend an answer to a complaint, *Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987), and to vacate an order denying both sides right to employ preemptory challenges, *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988).

2 In *Richardson*, the Second Circuit stated that absent extraordinary circumstances, "a [district] court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson*, 825 F.2d at 652. We are in agreement with this principle.

Accordingly,

IT IS ORDERED THAT:

Halliburton's petition is granted. The district court's order is vacated and the district court is directed to allow the filing of motions authorized by the Federal Rules of Civil Procedure.

C.A.Fed.(Tex.), 1993.

In re Halliburton Co.

END OF DOCUMENT

APPENDIX R

SAMPLE AGENCY "FINAL AGENCY DECISION"

Department of Health and Human Services
Public Health Service
National Institutes of Health
Bethesda, Maryland 20892

Certified Mail - Return Receipt Requested
(Certified Mail No. Z 083 489 293)

November 14, 1996

Mr. Frank P. Lukacs
P. O. Box 3143
McLean, Virginia 22103

Re: NIH-013-96

Dear Mr. Lukacs:

On November 1, 1995, the Office of Equal Opportunity received your formal complaint of discrimination. Based on your complaint, the following allegation was identified:

Was Complainant discriminated against based on race, sex, national origin, age, retaliation, and reprisal when his request, dated March 25, 1995, to the Director, National Institutes of Health (NIH) asking him to issue a memorandum to all NIH employees encouraging participation

in the European American Males in Government 1995 First Annual National Training Conference, as was done for the annual national training conference held by the Federally Employed Women and Blacks in Government, was denied?

Your allegation is dismissed from further processing because it fails to state a claim. Equal Employment Opportunity Commission (EEOC) Regulation 29 C.F.R. § 1614.107(a) provides that an agency shall dismiss a complaint or a portion of a complaint that fails to state a personal claim or show harm due to a term, condition, or privilege of employment within the meaning of 29 C.F.R. § 1614.103.

To establish standing as an "aggrieved employee" within the context of 29 C.F.R. § 1614.103, you must allege, first of all, that you have been injured in fact. *Hackett v. McGuire*, 445 F.2d 442 (3rd Cir. 1971). Specifically, you must allege some direct harm that affects a term, condition, or privilege of employment. *See Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). There is no allegation or evidence that you suffered any employment related loss or harm as a result of the Director, NIH, not issuing a memorandum to all employees encouraging them to participate in the conference you were promoting.

Decision

It is the decision of the NIH Office of Equal Opportunity to dismiss your allegation for failure to state a claim.

Notice of Right to Appeal

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, in accordance with 29 C.F.R. § § 1614.402 and 1614.403. Enclosed is a copy of 29 C.F.R. § § 1614.402 and 1614.403 and the following is a summary of your rights and responsibilities under those sections.

Within thirty (30) calendar days of your receipt of this decision, you have the right to appeal this decision by mail to:

Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

or hand deliver to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
1801 L Street N.W.
Washington, D.C. 20507

or send facsimile to:

(202) 690-7022.

You should use EEOC Form 573, Notice of Appeal/Petition (enclosed), and you should indicate what you are appealing. In or attached to the appeal, you must certify the date and method by which service was made on the agency. You must furnish a copy of the appeal to:

Director, Office of Equal Opportunity
National Institutes of Health
Building 31, Room 2B34
31 Center Drive, MSC STOP 2109
Bethesda, Maryland 20892-2109

at the same time that you file the appeal to the Commission. Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the Director, Office of Equal Opportunity, NIH, within thirty (30) calendar days of filing the appeal.

Notice of Right to File a Civil Action

Under 29 C.F.R. § 1614.408, you also have the right to file a civil action in an appropriate United States district court. If you choose to file a civil action, you may do so

-within ninety (90) calendar days of receipt of this decision if no appeal has been filed, or

-within ninety (90) calendar days after receipt of the EEOC's final decision on appeal, or

-after 180 calendar days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

You must name the person who is the official agency head or department head as the defendant. Agency or department means the national organization, and not just the local office, facility, or department in which you might work. Do not name just the agency or department. You must also state the official title of the agency head or department head. In your case, you must name the Honorable Donna E. Shalala, Secretary of Health and Human Services, as the defendant. Failure to provide the name or official title of the agency head or department head may result in dismissal of your case.

If you decide to file a civil action under Title VII or under the Rehabilitation Act and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the

action without payment of fees, costs, or other security. The grant or denial for an attorney does not extend your time in which to file a civil action. Both the request and the civil action **must be filed within ninety (90) calendar days** of the date you receive the Commission's decision.

Sincerely,

Naomi Churchill, Esq.
Director
Office of Equal Opportunity

Enclosures

cc: Hilda Dixon, EEO Officer, OD

APPENDIX S

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY "FINAL EEOC DECISION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O.Box 19848
Washington, D.C. 20036

November 19, 1996

Frank P. Lukacs,
Appellant,
v.
Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Appeal No. 01960502
Agency No. NIH-135-95

FACTS ABOUT FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT PROCESSING REGULATIONS (29 CFR PART 1614)

STATUTES COVERED BY 1614 REGULATIONS

Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate in employment based on race, color, religion, sex, or national origin. ...

RETALIATION / REPRISAL

A person who files a complaint or charge, participates in an investigation or charge, or opposes an employment practice made illegal by any of the above statutes is protected from retaliation.

FILING A COMPLAINT WITH A FEDERAL AGENCY

The first step for an employee or applicant who feels he or she has been discriminated against by a federal agency is to contact an equal employment opportunity counselor at the agency where the alleged discrimination took place within 45 days of the discriminatory action. Ordinarily, counseling must be completed within 30 days. The aggrieved individual may then file a complaint with that agency.

The agency must acknowledge or reject the complaint and if it does not dismiss it, the agency must, within 180 days, conduct a complete and fair investigation.

If the complaint is one that does not contain issues that are appealable to the Merit Systems Protection Board (MSPB), at the conclusion of the investigation, the complainant may request either a hearing by an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ) or an immediate final decision by the employing agency.

The AJ must process the request for a

hearing, issue findings of fact and conclusions of law, and order an appropriate remedy within 180 days.

After the final decision of the agency, the complainant may appeal to the Commission within 30 days or may file in U.S. District Court within 90 days. Either party may request reconsideration by the Commission. The complainant may seek judicial review.

FINAL DEPARTMENT DECISION

"This is to inform you of the Department's decision in regard to the subject complaint of discrimination filed against the National Institutes of Health (NIH).

You allege that you were discriminated against on the bases of age (45), sex (male) and national origin (Hungarian) when on May 11, 1994, senior NIH management officials met on Capitol Hill with members of the National Association for the advancement of Colored People (NAACP), Blacks in Government (BIG), and Congressman Albert Wynn, to discuss NIH's progress on several specific issues since May 1993. ...

First, a review of the Equal Employment Opportunity (EEO) Counseling Report shows that you are complaining about an "invitation only" meeting hosted by Congressman Albert Wynn, which included high level NIH officials and

special interest groups. ...

Further, you indicated to the EEO Counselor that your perception of discrimination derives from your belief that "no members of the European American Males in Government, or anyone at all to represent the views of any European American Males" were included in the meeting. ...

FINAL EEOC DECISION

The final agency decision is AFFIRMED.

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, in accordance with 29 CFR §1614.402 and §1614.403.

§1614.402 Time for Appeals to the Commission ...

§1614.403 How to Appeal ...

You have the alternative of seeking judicial relief by filing a civil action in an appropriate U.S. District Court within ninety (90) calendar days after receipt of this notice of final decision. Please note: If you file a notice of appeal with the Commission, the right to file a civil action

will be preserved. In that case, you may file a civil action within ninety (90) calendar days after receipt of the Commission's decision; or, if the commission has not issued its decision, 180 calendar days after the date the Office of Federal Operations accepted the appeal.

If you elect to file a civil action, you must name as the defendant, the Honorable Donna E. Shalala, Secretary of the Department of Health and Human Services. Failure to name the Secretary may result in the loss of any judicial redress to which you may be entitled. You are further advised that you may appeal to a U.S. District Court for appointment of an attorney to represent you in any court proceedings relating to this decision. The court may appoint an attorney to represent you and may permit commencement of a court action without payment of fees, costs, or security.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0795)

The commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the

previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date of this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating

circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (S0993)

It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL

NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § § 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to tile a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION
Signature of Ronnie Blumenthal

_____

Ronnie Blumenthal, Director
Office of Federal Operations

APPENDIX T

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY "FINAL EEOC DECISION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O.Box 19848
Washington, D.C. 20036

Frank P. Lukacs,
Appellant,

v.

Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Appeal No. 01962294
Agency No. NIH-279-95

DECISION

Appellant alleges that the agency discriminated against him on the bases of his race (White), sex (male), and national origin (Czechoslovakia) when the agency's Office of Equal Employment Opportunity changed the name of its publication from NIH OEO Digest to the Diversity Digest. The agency dismissed the

complaint on the ground that the complainant failed to allege that he suffered any personal harm or loss as a result of this change in name. For the following reasons, we AFFIRM the FAD.

The appellant's complaint is based on a misconceived notion that a mere change in the name of the agency's digest from "OEO" to "Diversity" signals a change in the agency's employment policy to provide an equal employment opportunity to white males. He claims that the "name change is merely symptomatic and exemplary of the entire philosophical and practical implications of the entire now misdirected self perceived mission of the NIH Office of Equal Employment Opportunity, a radical shift away from equal employment opportunity for all, including white males, to that of unequal employment opportunity, excluding white males." (Errors, omissions, and emphasis, in original.) Other than this claim of a symptomatic problem, the appellant fails to allege that he has in fact been denied any job opportunity on an alleged discriminatory basis. Moreover, the appellant mistakenly believes that the word "diversity" means "inequality". Besides, regardless of the name given to an agency publication, all agency employees, including the appellant, remain entitled to equal employment opportunities by law.

We, therefore, AFFIRM the FAD.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0795)

The commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date of this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST

be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (S0993)

It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be

aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights

Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § § 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to tile a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION

Signature of Ronnie Blumenthal

_____

Ronnie Blumenthal, Director
Office of Federal Operations

December 18, 1996

_____

DATE

APPENDIX U

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY
"FINAL EEOC DECISION
ON REQUEST FOR RECONSIDERATION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

Frank P. Lukacs,
Appellant,
v.
Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Request No. 05960388
Appeal No. 01952863
Agency No. NIH 027-95

At the time appellant filed his EEO complaint in 1994, he was a Technology and Development Patent Specialist, GS-301-14. He has a Juris Doctor degree. In his complaint, appellant alleged the he was subject to racial, (white), national origin (European), sex (male), and age (DOB 06/27/49) discrimination when he read an article in the November 23, 1993 edition of *The Record*, an agency publication, describing

a training grant program to provide research training opportunities abroad for minority university students to stimulate interest in biomedical and behavioral research careers, and for minority faculty to conduct research in institutions abroad. Appellant alleged that there had been a hiring and promotion freeze at the GS-13, GS-14, and GS-15 levels, and money spent on the grant program could have been spent on this and for training everyone, creating opportunities for all employees. ...

RIGHT TO FILE A CIVIL ACTION (S0993)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court. **It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision.** You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR

DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § § 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to tile a civil action. Both the request and the civil action must be filed within the time

limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION

Signature of Frances M. Hart

_____

Executive Officer
Executive Secretariat

June 19, 1997

_____

DATE

APPENDIX V

SAMPLE DEPARTMENT "FINAL AGENCY DECISION"

Department of Health and Human Services
Office of the Secretary
Washington, D.C. 20201

Certified Mail - Return Receipt Requested

August 28, 1997

Mr. Frank P. Lukacs
P. O. Box 3143
McLean, Virginia 22103

Re: File Number OEO-126-95,
OEO-148-95 and OEO-036-96
DOF: 03/04/96

Dear Mr. Lukacs:

This is to inform you of the Department's final decision on the subject Equal Employment Opportunity (EEO) complaint filed against the National Institutes of Health (NIH).

You alleged that you were discriminated against on the basis of your prior EEO activity when you were required to provide a doctor's certificate for **one day** of sick leave; on the bases of your prior EEO activity, age (dob 06/27/49), race (White),

sex (male) and national origin (Czechoslovakian/European), when the Agency issued you a **Performance Counseling Memorandum**. ...

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, in accordance with 29 CFR §1614.402 and §1614.403.

§1614.402 Time for Appeals to the Commission ...

§1614.403 How to Appeal ...

You have the alternative of seeking judicial relief by filing a civil action in an appropriate U.S. District Court within ninety (90) calendar days after receipt of this notice of final decision. Please note: If you file a notice of appeal with the Commission, the right to file a civil action will be preserved. In that case, you may file a civil action within ninety (90) calendar days after receipt of the Commission's decision; or, if the commission has not issued its decision, 180 calendar days after the date the Office of Federal Operations accepted the appeal.

If you elect to file a civil action, you must name as the defendant, the Honorable Donna E.

Shalala, Secretary of the Department of Health and Human Services. Failure to name the Secretary may result in the loss of any judicial redress to which you may be entitled. You are further advised that you may appeal to a U.S. District Court for appointment of an attorney to represent you in any court proceedings relating to this decision. The court may appoint an attorney to represent you and may permit commencement of a court action without payment of fees, costs, or security.

FOR THE DEPARTMENT:

Sincerely,

John J. Callahan
Director
Equal Employment Opportunity

cc: Director, EEO, NIH

APPENDIX W

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY
"DOCKETING OF EEOC
REQUEST FOR RECONSIDERATION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

July 30, 1997

Frank P. Lukacs,
Appellant,
v.
Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Docket No.	05970934
Appeal No.	01970870
Agency No.	NIH 344-91
	NIH 120-92

Your request for reconsideration has been docketed and assigned the docket number listed above. Please refer to the docket number on all correspondence to this office.

Parties may request reconsideration

provided that such request is made within thirty (30) calendar days of receipt of a decision issued pursuant to Section 1614.407. The opposing party has twenty (20) calendar days from their receipt of the request to reconsider to submit comments or opposition brief. Requests for reconsideration shall be submitted to the Office of Federal Operations. Copies of all documents submitted to this office must also be submitted to the opposing party since this office will not do so.

(From EEOC decision on which request to reconsider was based:

At the time appellant sought EEO counseling on his complaints he worked for the agency as a contract specialist, GS-1102-12. He has a Juris Doctor degree.

In complaint NIH 344-91, appellant alleged that he was discriminated against on the bases of age (41) and national origin (Czechoslovakia) when the agency used rating criteria to evaluate his applications for two positions that did not give credit for his undergraduate, graduate, and professional education. The positions in question were contract specialist, GS-1102-11/12 and 9/11/12. They were advertised under vacancy announcements OD-90-0395 and CA-91-0014A, which closed in January 1991 and February 1991.

Under complaint NIH 120-92, the agency consolidated what appeared to be three informal complaints by appellant into one formal complaint. The agency defined the complaint in a final decision that dismissed part of the complaint. The complaint as defined, alleged that appellant was discriminated against on the bases of age, national origin, and reprisal for EEO activity, as applicable, when: (1) he learned in April 1991 that he was not selected for the position of contract specialist under vacancy announcement CA-91-0014A, (2) he learned in April 1991 that he was not selected for the position of contract specialist under vacancy announcement OD-90-0395, (3) he was informed that he would not be permitted to attend a one week course, entitled Federal Contract Law, for which he was scheduled commencing April 1991, (4) the agency used rating criteria for the position of contract specialist, GS-1102-12/13, under vacancy announcement DK-91-0490 (Footnote 1: The announcement closed in May 1991) that precluded appellant from being considered for the position, and (5) the agency used rating criteria for the position of contract specialist, GS-1102-12/13 under vacancy announcement OD-91-0063 (Footnote 2: The announcement closed in April 1991) that precluded him for being considered for the position.

Appellant appealed the above referenced final

agency decision to the Commission. Other than stating that his complaint also alleged discrimination on the bases of his race (white) and sex (male), appellant did not contest the agency's characterization of complaint NIH 120-92 in that appeal. In its appeal decision, the Commission characterized the allegations in complaint NIH 120-92 as set forth by the agency. The Commission reversed the agency's procedural decision. (Footnote 3: Lukacs v. Department of Health and Human Services, EEOC Appeal No. 01922704 (January 12, 1993).) Appellant did not request the Commission to reconsider its appeal decision. Thereafter, the agency issued a merits decision finding no discrimination on allegations 4 and 5 of complaint NIH 120-92. In its appeal decision, the Commission vacated the agency's final decision. According to the Commission's decision, appellant contended on appeal that allegations 4 and 5 did not concern whether he was properly precluded from those positions under agency rating criteria, but whether the rating criteria itself was discriminatory. The Commission ordered the agency, among other things, to process allegations 4 and 5 and to clarify each issue in the complaint. (Footnote 4: Lukacs v. Department of Health and Human Services, EEOC Appeal No. 01932116 (August 25, 1995).) Appellant did not request the Commission to reconsider its appeal decision.

On remand, the agency advised appellant that it would investigate complaint NIH 344-91 and allegations 4 and 5 of complaint NIH 120-92. The agency previously accepted allegations 1, 2, and 3 of complaint NIH 120-92, but did not explain the status of these allegations. ...

On appeal, appellant states that complaint NIH 120-92 contains allegations that were ignored. Appellant refers to one of the three apparent informal complaints written in May 1991 of which NIH 120-92 is comprised. Appellant observed this complaint contained allegation 3. He also avers it alleged reprisal discrimination for EEO activity when he was told that he would not receive another performance appraisal with the rating of "excellent" or get a promotion. A reading of this complaint reveals its thrust concerns allegation 3, but it also mentioned the latter matters. ...

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0795)

The commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available

that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date of this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).)

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*Decemb. 11, 1997
	*Civil Action #s
FRANK PAUL LUKACS	*PJM-97-379
	*PJM-97-3359
Plaintiff	*PJM-97-3483
	*PJM-97-3495
v.	*
	*
DONNA E. SHALALA, et al.	*
	*
Defendants	*Septem. 08, 1998
	*Civil Action #
* * * * * * * * * * * * * * *	*PJM-96-2913

PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3495 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Plaintiff respectfully submits this motion for consolidation of PJM-96-2913 filed on 09/17/96, and PJM-97-0379 filed on 02/06/97, and PJM-97-3359 filed on 10/03/97, and PJM-97-3483 filed on 10/17/97, and PJM-97-3495 filed on 10/20/97, with all of the preceding civil actions being captioned Frank Paul Lukacs Plaintiff Versus Honorable Donna E. Shalala Et Al Defendants, and all of the preceding civil actions presently pending before United States District Court Judge Peter J. Messitte in the United States District Court for the District of Maryland.

The reasons for this motion to consolidate are set forth in the accompanying memorandum.

Respectfully submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*Decemb. 11, 1997
	*Civil Action #s
FRANK PAUL LUKACS	*PJM-97-379
	*PJM-97-3359
Plaintiff	*PJM-97-3483
	*PJM-97-3495
v.	*
	*
DONNA E. SHALALA, et al.	*
	*
Defendants	*Septem. 08, 1998
	*Civil Action #
* * * * * * * * * * * * * * *	*PJM-96-2913

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3495 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Federal Rules of Civil Procedure Rule 42. Consolidation; Separate Trials states that "(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.". ...

If anyone has bothered reading that which Plaintiff has filed, it should be obvious that Plaintiff has challenged several so called affirmative action programs, or rather affirmative discrimination programs, while employed as a civil servant in the in the United States federal government, and with some of the common issues of fact presented, part of the common issue of law becomes whether any of these inherently discriminatory programs under the strict scrutiny test which demands narrowly tailored measures that further a compelling government interest are illegal or unconstitutional. "Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly

tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114. Unfortunately, the filing of equal employment opportunity complaints of discrimination challenging the legality and constitutionality of such discrimination resulted in numerous instances of retaliation, reprisal, harassment, the creation of a hostile working environment, and the eventual constructive discharge of Plaintiff. ...

"The common question standard has a long history, figuring in such landmark decisions as *Mutual Life Ins. Co. v. Hillmon*, where the Supreme Court made an order consolidating three separate lawsuits regarding the death of an insured, because the actions were "of like nature and relative to the same question." The Court justified its decision as one calculated to "avoid unnecessary cost and delay". *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892) (landmark Supreme Court consolidation case involving dispute over life insurance policies)." 8 *Moore's Federal Practice*, § 42.10 [1] [a] (Matthew Bender 3d ed. 1997). ...

"A common factual issue, such as two lawsuits pending in the same court and brought by the same plaintiff, is a sufficient basis for consolidation if combining the two cases

will simplify the litigation process. Especially if the alternative (to dismiss the second lawsuit and require the plaintiff to amend its first complaint to add the dismissed allegations) would be a complicated exercise of form over substance, consolidation is generally preferred. *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (court found consolidation of two cases filed by same plaintiff "enhanced efficiency and economy for all concerned")." 8 *Moore's Federal Practice*, § 42.10 [1] [c] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Multiple Filings by One Plaintiff May be Consolidated".

"The broad managerial power of the district court to consolidate extends to the consolidation of cases where no motion has been brought. A trial court has the power sua sponte to hold a hearing to determine whether the actions then pending before it should be consolidated. *Katz v. Realty Equities Corp. of N. Y.*, 521 F.2d 1354, 1356 (2d Cir. 1975) (court held hearing to determine consolidation). *Miller v. United States Postal Service*, 729 F.2d 1033, 1036-1037 (5th Cir. 1984) (appellate court remanded cause with instructions to district court to consolidate two cases for trial.) No motion was pending." 8 *Moore's Federal Practice*, § 42.10 [2] [b] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Broad Discretion Extends to Power to Consolidate Sua Sponte".

"Even when the parties or issues of law are not identical, courts may, without any motion pending (such as in cases involving pro se plaintiffs with claims against the United States), find a commonality of law or fact and consolidate a case with other pending cases. Consolidation sua sponte when cases are similar, not identical. ***Capps v. Eggers,*** **782 F.2d 1341, 1342 (5th Cir. 1986) (court consolidated pro se taxpayer's lawsuit with other similar lawsuits pending in same court)."** **8** ***Moore's Federal Practice,*** **§ 42.10 [2] [b] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Broad Discretion Extends to Power to Consolidate Sua Sponte".**

...

Here there has been no discovery, and barring a favorable appeals court intervention, there will probably never be any discovery, despite all of the many genuine issues of material fact, just as much as there has never been any of the mandatory formal independent investigations of the equal employment opportunity complaints according to 29 C.F.R. 1614, which is just one more of the many common issues of law or fact, for discovery of the real facts, or even a formal independent investigation of the equal employment opportunity complaints according to 29 C.F.R. 1614, is the very last thing that people who favor affirmative discrimination

want, or for all of their talk of tolerance are themselves least willing to tolerate, for the real facts may just prove that affirmative action is in fact nothing but a very thinly disguised form of actual discrimination. ...

"Consolidation of separate actions presenting a common issue of law or fact is permitted under Rule 42 as a matter of convenience and economy in judicial administration. ... Although the public employee's initial employment discrimination action under Section 2000 e et seq. of Title 42 and his subsequent action alleging removal from employment for constitutionally impermissible reasons arose out of the same set of facts and sought basically the same relief, the district court erred in dismissing the second action on the ground that the earlier suit arose from the same set of facts. The proper solution would have been to consolidate the two separate actions in the interests of equity and judicial economy. *Miller v. U.S. Postal Serv.*, C.A.5th, 1984, 729 F.2d 1033." 9 *Wright & Miller, Federal Practice and Procedure:* Civil 2d § 2383 (1995), text plus footnote 1 case. ...

"The pendency of an earlier action in the same federal district court was not a ground for dismissal of a subsequently instituted action that was alleged to be based on a cause

of action identical to that in the pending action against the same defendants, and the proper solution would be to consolidate those actions. *Thomas v. Deason*, D.C.Ky. 1970, 317 F.Supp. 1098, 1099." 9 *Wright & Miller, Federal Practice and Procedure*: Civil 2d § 2383 (1995), footnote 1 case. ...

"Although identity of the parties strengthens the case for consolidation under Rule 42 (a) it is not required. A substantial common question of law or fact is enough. If an appropriate common question exists, courts often have consolidated actions despite differences in the parties. ... Civil rights action challenging the racial discrimination in the allocation of park resources was consolidated for trial with an action charging racial discrimination in the allocation of park resources as well as employment discrimination in the park district when the parties and claims were essentially the same, the subject matter was the same, and the common issue was whether the defendants were administering the park system in a racially discriminatory manner. *Midwest Community Council, Inc. v. Chicago Park Dist.*, D.C.Ill. 1983, 98 F.R.D. 491." 9 *Wright & Miller, Federal Practice and Procedure*: Civil 2d § 2384 (1995). ...

Let us take a simplified hypothetical case, omitting a lot of details for our

present purposes of illustration.

1 Suppose a white male plaintiff timely files an individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number one, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

2 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number two, on the denial of some benefits because he is a white male, with that same benefit however being given to minorities and females.

3 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number three, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

4 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29

C.F.R. § 1614, designated as EEO number four, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

5 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number five, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

6 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number six, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

7 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number seven, on perhaps his nonselection for another affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

8 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number eight, on perhaps retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

9 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number nine, on perhaps additional retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

10 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number ten, on perhaps additional retaliation and reprisal and retaliatory constructive discharge for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative

action programs.

I Then a few months later, or even a few years later, plaintiff having met the procedural time requirements of 29 C.F.R. § 1614 on his fifth individual equal employment complaint, finally files a complaint in federal court, on his fifth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say September 17, 1997, with the civil action number being, let us say hypothetically PJM-96-2913. Plaintiff files his first complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on his nonselection for an affirmative action designated job vacancy announcement with the position having been filled by a less qualified minority or female, as well as challenging the constitutionality of the so called affirmative action statutes, regulations, rules, and procedures.

II Then a few months later, let us say on November 14, 1996, the agency issues a final decision on plaintiff's fourth individual equal employment opportunity complaint. Plaintiff now only has ninety days in which to file a complaint in federal court on his fourth equal employment opportunity complaint. Then later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's second individual equal employment opportunity complaint, let us say on November 19, 1996.

Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. Then the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's third individual equal employment opportunity complaint, let us say on December 18, 1996. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. With the first of the three ninety days almost having expired, plaintiff quickly files a complaint in federal court, on his second equal employment opportunity complaint, on his third equal employment opportunity complaint, and on his fourth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say February 06, 1997, with the civil action number being let us say hypothetically PJM-97-379. Plaintiff files his second complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of a benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379. However because of the procedural requirements for filing a civil

action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-379 until November 14, 1997 and had to have filed by February 14, 1997.

III Then a few months later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's sixth individual equal employment opportunity complaint, let us say on July 08, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his sixth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say October 03, 1997, with the civil action number being let us say hypothetically PJM-97-3359. Plaintiff files his third complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3359 until July 08, 1997 and had to have filed by October 08, 1997.

V Then a few months later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's eighth individual equal employment opportunity complaint and plaintiff's ninth individual equal employment opportunity complaints, let us say on July 16, 1997, with the agency adopting the EEOC decision as its own agency final decision on August 28, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his eighth and ninth and tenth equal employment opportunity complaints, and let us for the sake of argument pick a date, any date, say October 20, 1997, with the civil action number being let us say hypothetically PJM-97-3495. Plaintiff quickly files his fifth complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age as well as claims for retaliation and reprisal, with the retaliation and reprisal serving as additional evidence of plaintiff's claim of retaliatory constructive discharge. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until August 28, 1997, but had to have filed

by November 28, 1997.

VI or III Then a few months later, after having been to the Equal Employment Opportunity Commission four times on plaintiff's first individual equal employment opportunity complaint, plaintiff has a window of opportunity to finally file a civil action in an appropriate United States District Court. Plaintiff in not wanting to file another federal court complaint instead chooses to amend his third federal court complaint PJM-97-3359 with the contents of his first equal employment opportunity complaint on let us say May 27, 1998. Plaintiff now has some additional common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until February 1998.

VII Etcetera.

(Added to this scenario is the fact that plaintiff's first federal court complaint PJM-96-2913 was physically up on appeal at the Fourth Circuit Court of Appeals for most of this time, not to mention that the district court had ordered the parties not to file any motions, and later not to file any pleadings, thereby preventing plaintiff-appellant from amending or supplementing his first federal court complaint.)

Since there are several common questions of law or fact plaintiff files a motion to consolidate. The court however without any explanation or comment at all decides that there are no common questions of law or fact and denies the motion to consolidate. The court instead dismisses plaintiff's PJM-97-379 and PJM-97-3359 and PJM-97-3495 federal court complaints, for although there are supposedly no common questions of law or fact, the court finds them to be duplicative of claims, whatever that means.

One of the problems with this totally incorrect analysis is that the court is totally ignoring the simple fact that it was the very limited time frames in which plaintiff had to file federal court complaints which resulted in the several federal court complaints in the first place, and which now prevents the district court, apart from the district court first employing the procedure of consolidation, from acting on plaintiff's federal court complaints all at once for the stated reasons.

So much for hypotheticals. Unfortunately, the preceding hypothetical is basically what really happened in the United States District Court for the District of Maryland in PJM-96-2913, PJM-97-379, PJM-97-3359, and PJM-97-3495.

So now what is really going on. Plaintiff posits that with plaintiff being a white male who is challenging so called

affirmative action programs for minorities and females, and with the district court judge having been appointed by President Clinton who is the biggest public supporter of so called affirmative action programs for minorities and females, the reality of the matter is that this court is obviously going to do everything it can to make sure that defendants do not lose and correspondingly that plaintiff does not win. ...

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*01/06/98
	*PJM-97-3359
FRANK PAUL LUKACS	*
	*01/06/98
Plaintiff	*PJM-97-3483
	*
v.	*05/21/98
	*PJM-97-3495
DONNA E. SHALALA, et al.	*
	*08/24/98
Defendants	*PJM-97-379
	*
	*08/27/98
	*PJM-97-3359
	*
	*10/08/98
* * * * * * * * * * * * * * *	*PJM-96-2913

PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE RULE 55

Plaintiff respectfully submits this motion for judgment by default according to Federal Rules of Civil Procedure Rule 55.

The reasons for this motion for judgment by default are set forth in the accompanying memorandum.

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*08/19/98
	*
FRANK PAUL LUKACS	*Civil Action #
	*
Plaintiff	*PJM-96-2913
	*
v.	*
	*
DONNA E. SHALALA, et al.	***AMENDED**
	*
Defendants	***PLEADING**
	*
* * * * * * * * * * * * * * *	*

PLAINTIFF'S AMENDED PLEADING

ONCE AS A MATTER OF COURSE

BEFORE A RESPONSIVE PLEADING

HAS BEEN SERVED

APPENDIX BB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * *

FRANK PAUL LUKACS *

Plaintiff *09/01/98

v. *Civil Action #

DONNA E. SHALALA, et al. *PJM-96-2913

Defendants *

* * * * * * * * * * * * * * * *

Motion for Enlargement of Time
to Respond to Amended Complaint

Defendants, by and through their attorneys, Lynne A. Battaglia, United States Attorney for the District of Maryland, and Earle B. Wilson, Assistant United States Attorney, for said District, respectfully move for an enlargement of time to answer, move, or otherwise plead to plaintiff's amended complaint ...

At the same time that the Court denied plaintiff's motions, it directed that the parties file no further motions. ...

Plaintiff does not consent to this motion. Wherefore, the United States prays for an order extending through and including September 30, 1998 for all of the defendants to answer, move, or otherwise plead to plaintiff's amended complaint.

Respectfully Submitted

Lynne A. Battaglia
United States Attorney

by: Signature of Earle B. Wilson

Earle B. Wilson #24414
Assistant U.S. Attorney
6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21202-2692
(410) 209-4827

APPENDIX CC

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770

Mailed September 02, 1998

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143

Re: Case No. PJM-96-2913

Dear Mr. Lukacs:

The Clerk received your "Amended Complaint" on 8/19/98; however, it is deficient in the areas checked below:

A "Motion for Leave to File an Amended Complaint" and proposed Summonses prepared in blank is required, (in duplicate).

The Clerk is directed to return the above paper(s) to counsel.

Very truly yours,
Signature of Peter J. Messitte, Jr.

_____

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX DD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 74**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3495 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPENDIX EE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 74**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3435 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPENDIX FF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 75**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT "ONCE AS A MATTER OF COURSE BEFORE A RESPONSIVE PLEADING HAS BEEN SERVED"

Plaintiff respectfully submits this motion for leave to file an amended complaint "once as a matter of course before a responsive pleading has been served".

The reasons for this motion are set forth in the accompanying memorandum.

APPENDIX GG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
V.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 75**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT ONCE AS A MATTER OF COURSE BEFORE A RESPONSIVE PLEADING HAS BEEN SERVED

"A PARTY MAY AMEND THE PARTY'S PLEADING ONCE AS A MATTER OF RIGHT BEFORE A RESPONSIVE PLEADING IS SERVED"

Defendants to date have not submitted a "responsive pleading".

"**Federal Rules of Civil Procedure Rule 15 states that**

"**(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served** or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires**. A party shall plead in response to an amended pleading within the time remaining for service to the original pleading or within 10 days after service of the amended pleading, wherever period may be longer, unless the court orders otherwise."

Defendants to date have not submitted a "responsive pleading".

Plaintiff tried to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served" as per FRCP Rule 15 (a) Amendments with a verified pleading.

"The rule allows for liberal amendments in the interests of resolving cases on the merits." 3 Moore's Federal Practice, § 15.02

[1] (Matthew Bender 3d ed.). **It is entirely contrary to the spirit of the Rules for decisions on the merits to be avoided on the basis of technicalities**, *Foman v. Davis*, 371 U.S. 178, 181-182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). **When plaintiff asserts a claim, even if inartfully stated, the Rules require that plaintiff be given an opportunity to have the claim considered on the merits**, *Doussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981). The court's discretion to dismiss claim without leave to amend is limited by direction of Rules to amend where justice requires, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). **The pleadings are not a game of skill in which "one misstep by counsel may be decisive to the outcome"**, *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

"A party is allowed to amend a pleading once "as a matter of course" or without leave of court", 3 Moore's Federal Practice, § 15.10 (Matthew Bender 3d ed.). **The district court erred in refusing to allow an amended complaint to add a First amendment claim because defendants never filed a responsive pleading and only filed a motion to dismiss for failure to state a claim**, *Caine v. Hardy*, 905 F.2d 858, 863 (5th Cir. 1990). **Since defendants had not filed a responsive pleading, plaintiff had a right to amend on remand**, *Schiffels v. Kemper Fin. Serv., Inc.*,

978 F.2d 344, 353-354 (7th Cir. 1992). **The court improperly denied leave when plaintiff was under no obligation to ask for leave because defendant had not filed responsive pleading**, *Stewart v. RCA Corp.*, 790 F.2d 624, 631 (7th Cir. 1986). **Order denying amendment was improper when plaintiff may amend once without leave, and it is irrelevant that leave was not requested**, *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). **Plaintiff was allowed to amend once without leave, since only filing by defendant was motion to dismiss and to compel arbitration, which was not responsive pleading**, *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659-660 (11th Cir. 1987).

"A party may amend a pleading as a matter of course at any time before a responsive pleading is filed. ... the filing of a Rule 12(b) defense extends the time for filing an answer". 3 Moore's Federal Practice, § 15.11 (Matthew Bender 3d ed.). **If the time for serving a responsive pleading is extended, then the right to amend is extended**, *Prudential Sec. Ltd. Partnership Litig.*, 158 F.R.D. 562, 567-568 (S.D.N.Y. 1994). **Motion to dismiss is not a responsive pleading so the right to amend was not cut off and the district court was obligated to review the amended complaint**, *Hill v. City of Indianapolis*, 17 F.3d 1016, 1018 (7th Cir.

1994). **The right to amend is terminated only by a responsive pleading**, *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995), *Mayes v. Leipsiger*, 729 F.2d 605, 607 (9th Cir. 1984). **The right to amend was not cut off because no responsive pleading was filed**, *Fox v. Sierra Dev. Co.*, 876 F.Supp. 1169, 1170-1171 (D. Nev. 1995). **The court improperly denied leave because the plaintiff had a right to amend the complaint since no responsive pleading had been filed**, *Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993).

"The term responsive pleading is defined by reference to Rule 7(a), which distinguishes between pleadings and motions, and provides an exclusive list of what is a pleading: a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint, and an answer. Pre-trial motions attacking the pleadings or seeking relief as to collateral matters are not responsive pleadings. Accordingly if no responsive pleading has been filed, the filing of these motions does not cut off a plaintiff's right to amend as a matter of course. Examples of pre-trial motions include: motions to dismiss, motions for summary judgment, motions for a more definitive statement under Rule 12, motions for production and inspection, and motions to quash service." 3 Moore's Federal Practice,

§ 15.11 (Matthew Bender 3d ed.). The court allowed the amendment and specified the types of pre-trial motions that did not constitute responsive pleadings, *Kroger Co. v. Adkins Transfer Co.*, 284 F.Supp. 371, 374 (D.C. Tenn. 1968). **A motion to dismiss and compel arbitration was not a responsive pleading**, *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659 (11th Cir. 1987). **A motion to dismiss is not a responsive pleading and order dismissing complaint does not cut off the right to amend**, *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995). **At the time of dismissal, defendant had not yet filed a responsive pleading, so plaintiff had a right to amend once as a matter of course**, *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344, 353-354 (7th Cir. 1992). **A motion to dismiss is not a responsive pleading**, *Miles v. Dep't of Army*, 881 F.2d 777, 781 (9th Cir. 1989). **When defendants only filed a motion to dismiss, plaintiff was entitled to amend as of right because it is well established in circuit that motion is not responsive pleading**, *Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993). **Neither motions for summary judgment nor dismissal are responsive pleadings**, *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984). **Court should have granted proposed amendment because no responsive pleading was filed**, *Ross v. Franzen*, 777 F.2d 1216, 1222 (7th Cir. 1985)."

"**One amendment is permitted of course before a responsive pleading is filed.** *Coral v. Gonse*, 330 F.2d 997 (4th Cir. 1964); *Wallace v. Chrysler Credit Corp.*, 743 F.Supp. 1228 (W.D. Va. 1990)." "**Motions to dismiss and for summary judgment are not considered responsive pleadings for purposes of subdivision (a) of this rule.** *Williams v. Wilkerson*, 90 F.R.D. 168 (E.D. Va. 1981)." "**Motions to dismiss and motions for summary judgment are not treated as responsive pleadings under this rule.** *United States ex rel. Tucker v. Thomas Howell Kiewit (USA) Inc.*, 149 F.R.D. 125 (E.D. Va. 1993)." "**Where defendants did not file an answer to plaintiff's original complaint, but rather filed motions to dismiss, such pre-answer Rule 12(b) motions not being responsive pleadings, plaintiff was not required to obtain leave of court before filing his amended complaint.** *Sohns v. Dahl*, 392 F.Supp. 1208 (W.D. Va. 1975)."

"**Federal Rules of Civil Procedure Rule 15 states that**

"**(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served** or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial

calendar, the party may so amend it at any time within 20 days after it is served. Otherwise **a party may amend the party's pleading** only by leave of court or by written consent of the adverse party; **and leave shall be freely given when justice so requires**. A party shall plead in response to an amended pleading within the time remaining for service to the original pleading or within 10 days after service of the amended pleading, wherever period may be longer, unless the court orders otherwise."

"After a responsive pleading has been filed, a party may amend the pleading only with leave of court or written consent of the adverse party. Although the ability to amend a pleading is not automatic and requires court approval, a district judge should freely grant leave to amend when justice requires, absent a substantial reason to deny. **A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)."** 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.).

"The text of Rule 15(a) is unequivocal regarding the requirement that leave to amend be liberally granted. The policy that a court should freely grant amendments limits a court's ability to deny leave to amend, and in a proper case, may warrant a finding of abuse of discretion in denying leave. During the pretrial phase, a court should allow

amendments to ensure that all the issues are before the court." 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.). The court's discretion to deny leave is limited by the procedural rule promoting amendment, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

"Under *Foman v. Davis* it is an abuse of discretion if the district court refuses to grant leave to amend without giving any reason." 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.). Courts should freely grant leave to amend, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). **If court lacks substantial reason to deny leave, discretion is not broad enough to permit denial**, *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1303 (5th Cir. 1995).

"The leading case regarding the trial court's exercise of discretion to deny amendment is *Foman v. Davis*. In *Foman*, the Supreme Court asserted that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." After the *Foman* decision, it is clear that a trial court must provide a reason for denying a motion to amend. The *Foman* decision also clarified the factors that a district judge may use to deny

leave to amend. These factors include: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment." 3 Moore's Federal Practice, § 15.15 [1] (Matthew Bender 3d ed.).

Defendants have not even bothered bringing up any of these factors, probably because they simply do not exist, as there has been no undue delay, no bad faith or dilatory motive on the part of the movant, no repeated failure to cure deficiencies by amendments previously allowed, no undue prejudice to the opposing party, and no futility of the amendment.

Courts should heed the mandate of Rule 15(a) that leave be freely given when justice requires, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). Leave to amend must be freely given when justice requires, *Subaru Distribs. Corp. v. General Ship Corp.*, 167 F.R.D. 342, 343 (D. Mass. 1996). Court normally grants leave, *Merney v. Valante & Sons Repair Shop*, 66 F.3d 25, 28 (2 Cir. 1995). Courts prefer to permit amendments, *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 235 (2d Cir. 1995). **Court erred in denying leave to amend complaint because it did not constitute a short and plain statement as required by Rule 8**, *Salahuddin v. Cuomo*, 861 F.2d 40, 42-43 (2d Cir. 1988). Leave should be freely given,

Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1464 (5th Cir.). **Court should freely grant leave to amend, especially with pro se plaintiff**, *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 103 (5th Cir. 1995). Liberal standards are applicable to motions for leave to amend, *Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180-1181 (7th Cir. 1992). Court should grant leave, *Frey v. City of Herculaneum*, 44 F.3d 667, 672 (8th Cir. 1995). District courts routinely grant leave to amend, *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1405 (11th Cir. 1994).

"Courts are inclined to allow leave to amend if it is possible for the plaintiff to cure the defects in the pleadings and state a valid legal claim. Courts should not dismiss the complaint unless it is beyond a doubt that there are no facts to support relief. Similarly, a court should not refuse leave to amend unless the same rigorous standard is met. This proposition is especially true for pro se plaintiffs, for whom the court should grant leave at least once if there is any indication of a valid claim." 3 Moore's Federal Practice, § 15.15 [3] (Matthew Bender 3d ed.).

Allegations of pro se litigants are held to a less stringent standard than pleadings drafted by lawyers, *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). **Court should provide opportunity to amend before dismissal for pro se plaintiff to**

develop case sufficiently to bring to light any merits of case, *Parker v. Fort Worth Police Dep't.*, 980 F.2d 1023, 1026 (5th Cir. 1993). **Before court may dismiss pro se litigant for failure to state claim, it must provide notice of deficiencies and opportunity to amend before dismissal**, *McGluckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992).

In determining whether to grant leave to amend, a court should consider whether any facts are alleged that are sufficient to support a claim. **The appellate court will review the facts de novo to determine if dismissal without leave to amend is proper."** 3 Moore's Federal Practice, § 15.15 [3] (Matthew Bender 3d ed.).

"This rule provides liberal practice in allowance of amendments to formal pleadings. *Coral v. Gonse*, 330 F.2d 997 (4th Cir. 1964). **In federal practice leave to amend is to be granted with liberality.** *Austin v. Reynolds Metals Co.*, 327 F.Supp. 1145 (E.D. Va. 1971)." **"Motion to dismiss held in abeyance so plaintiff could tender amended complaint.** *Miller v. Holiday Inns, Inc.*, 436 F.Supp. 460 (E.D. Va. 1977)."

"The movant's ability to obtain summary judgment will, however, vary according to the pleadings. Most obviously, a multiple count complaint makes it empirically less likely

that a movant can obtain summary judgment as to the entire case. In addition, a variety of claims makes a wider variety of information relevant to the disposition of the matter. As more information is relevant, a movant needs to do more to negate the possibility of a reasonable jury verdict in claimant's favor, making it harder for a movant to sustain its burden of showing entitlement to summary judgment, at least for the case as a whole. This phenomenon explains the historical reluctance of courts to grant summary judgment in large and complex cases, even though the summary judgment standard applicable is the same as that in ordinary litigation. [FN109] [FN109: Wider range of facts or competing inferences at issue makes summary judgment more difficult in large cases although same standards apply. See Herr, Haydock & Stempel, Motion Practice, § 16.1.11 at 443 (2d ed. 1991) (because large cases involve more sources of information, they present greater potential for factual disputes that may preclude summary judgment).] Moreover, in a case involving more claims, respondent has more opportunity to ferret out and focus on disputed factual matters that prevent resolution of the claim in the movant's favor. The claims and defenses at issue also determine what constitutes relevant evidence supporting or opposing summary judgment." 11 Moore's Federal Practice, § 56.30 [8] [a] [i] (Matthew Bender 3d ed. 1997) under section

entitled "[a] **Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions** [i] **Pleadings Frame Dispute and Consequently Affect Materiality**".

"Because the volume and nature of claims pleaded can affect summary judgment, a party seeking to avoid summary judgment may profit from amending its complaint to allege additional or different matter." 11 Moore's Federal Practice, § 56.30 [8] [a] [iii] (Matthew Bender 3d ed. 1997) under section entitled "[a] Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions [iii] **Motions to Amend Pleadings May Narrow or Broaden Factual and Legal Questions and Can Therefore Affect Summary Judgment**". Petitioner's original unverified pleading in PJM-96-2913 only recited the facts of a half a dozen of petitioner's individual equal employment opportunity complaints. Petitioner's proposed **amended verified pleading** in PJM-96-2913 recites the facts of about four dozen of petitioner's individual equal employment opportunity complaints, and contains additional claims, including rather reluctantly a claim for a be fired or quit

constructive discharge. However, if a Court simply refuses to even allow petitioner to file or to have docketed or to consider an amended complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means of the pleadings determining the relevance and materiality in litigation, for the contents of the pleadings to influence summary judgment decisions, and for the amended pleadings to broaden the factual and legal questions which can affect summary judgment, which may unfortunately be the real intent behind the order in the first place.

Verified pleadings "may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (**verified complaint treated as equivalent of an affidavit on a motion for summary judgment**; conclusory allegations would be ignored on summary judgment, but factual averments could be considered; complaint could be considered to the extent that it complied with the standards of Rule 56(e).) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings. However, if a Court

simply refuses to even allow petitioner to file or have docketed a verified complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means for an "equivalent to a supporting or opposing affidavit", which may unfortunately be the real intent behind the order in the first place.

Respectfully Submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX HH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*October 06, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 86**
	*
Defendants	*October 06, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION
OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION
ACCORDING TO F.R.C.P. RULE 65,
OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT
ACCORDING TO F.R.C.P. RULE 57,
OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT
ACCORDING TO F.R.C.P. RULE 56,
ON THE NATIONAL INSTITUTES OF HEALTH (NIH) FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM

(FEORP)

AND THE NATIONAL INSTITUTES OF HEALTH (NIH) AFFIRMATIVE EMPLOYMENT PROGRAM (AEP) AND THE UNITED STATES FEDERAL GOVERNMENT'S FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) and the National Institutes of Health (NIH) Affirmative Employment Program (AEP) and the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP).

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of any of the National Institutes of Health so called affirmative action programs for minorities or females or

hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), and b) that the means employed by any of the National Institutes of Health (NIH) so called affirmative action programs for minorities or females or hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), are not narrowly tailored measures, and Plaintiff further seeks to enjoin and prohibit the use of the National Institutes of Health (NIH) so called affirmative action programs based on race or gender or national origin on any of the elements of the National Institutes of Health (NIH) so called affirmative action programs or NIH FEORP or NIH AEP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), which are specifically mentioned in PJM-96-2913, including but not limited to: Violations of the Requirement to Rank or Group Candidates and Refer Only a Reasonable Number (Normally 3 to 5) of the Best Qualified Candidates for Selection Because of the NIH FEORP or the NIH

AEP; the Different Method of Selection under the NIH FEORP or the NIH AEP of Qualifications Review Board Members Who Evaluate and Refer Eligible Candidates for Selection; the NIH FEORP or the NIH AEP Requirement for the Justification and Approval of the Selection of the Best Qualified White Male, but not for the Selection of Even Minimally Qualified Minorities and Females; the Mandatory Classification of Candidates by Race and Gender under the NIH FEORP or NIH AEP; the Federal Government Officials' Responsibilities to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females and Hispanics under the NIH FEORP or the NIH AEP, and their Dual Mutually Exclusive Functions to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Equal Employment Opportunity Commission's (EEOC's) Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the NIH FEORP or NIH AEP; the Failure of the NIH to Seriously Consider, Interview, or Select White Males for the NIH FEORP or NIH AEP Designated Job Openings; and the Exclusion of Relevant Qualifications from Consideration for NIH

FEORP or NIH AEP Designated Job Openings.

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Plaintiff further seeks to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), programs of the United States federal government, including but not limited to: The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c); the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender and National Origin,

including but not limited to, Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women, Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, and Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force; the Equal Employment Opportunity Commission's Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the Federal Equal Opportunity Recruitment Program FEORP and the Affirmative Employment Program AEP; the Failure of the United States Government to Seriously Consider, Interview, or Select White Males for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; the Exclusion of Relevant Qualifications from Consideration for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; and the Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program FEORP.

The reasons for this motion are set forth in the accompanying memorandum.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*October 06, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 86**
	*
Defendants	*October 06, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION ACCORDING TO F.R.C.P. RULE 65, OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT ACCORDING TO F.R.C.P. RULE 57, OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT ACCORDING TO F.R.C.P. RULE 56, ON THE NATIONAL INSTITUTES OF HEALTH (NIH)

FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)
AND THE NATIONAL INSTITUTES OF HEALTH (NIH)
AFFIRMATIVE EMPLOYMENT PROGRAM (AEP)
AND THE UNITED STATES FEDERAL GOVERNMENT'S
FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

"The Supreme Court has said that the traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance, the plaintiff will suffer irreparable injury and also that the plaintiff is likely to prevail on the merits. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975). See also *In re Y & A Group Sec. Litig.*, 38 F.3d 380 (8th Cir. 1994). ... ***Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) (where constitutional rights have been infringed upon, the threat of irreparable injury and disservice to the public interest is clear).**" Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 696, §65.3. ...

"After providing that in all non-jury actions tried upon the facts, the court shall

find the facts specially and state separately its conclusions of law thereon, Rule 52(a) goes on to state that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". And the appellate court is normally justified in vacating the order and remanding for fuller explanation where the trial judge's findings and conclusions lack specificity. *Schmidt v. Lessard*, 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (citing Moore's)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 700, §65.7. ...

"The district court must set forth findings of fact and conclusions of law in granting or denying interlocutory injunctions. Rule 52 specifically requires that findings be made in these cases. The United States Supreme Court has described the need for fair compliance with the findings requirement in cases seeking interlocutory injunction as being of "the highest importance". [FN15] ([FN15] Highest importance. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S. Ct. 517, 84 L. Ed. 774 (1940).) As with findings in non-jury trials, the findings must be sufficient to allow the appellate court the opportunity to conduct a meaningful review

(see § 52.15)." 9 Moore's Federal Practice, § 52.10[2][a][i] (Matthew Bender 3d ed.) under section entitled "[2] Injunctions [a] Interlocutory Injunctions [i] Findings Usually Required." ...

"The purpose of injunctive relief is to prevent future harm. ... Future violations. See *United States v. Oregon Med. Soc'y*, 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952) (function of injunctive relief is to forestall future violations. See *United States v. Barr Lab., Inc.*, 812 F. Supp. 458, 487-488 (D.N.J. 1993) (injunctive relief used to prevent future harm." 13 Moore's Federal Practice, § 65.02 [2] (Matthew Bender 3d ed.). ...

"An injunction may be granted without a showing of past wrongs. ... Showing of past wrongs not required. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953) (party moving for injunctive relief need not show past wrongs). ... Injunctive relief proper prior to occurrence of harm. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1983-1984, 128 L. Ed. 2d 811 (1994) (plaintiff was not required to wait until after occurrence of "tragic event" (assault) in order to obtain injunctive relief)." 13 Moore's Federal Practice, § 65.02 [2] (Matthew Bender 3d ed.). ...

"An adequate remedy at law may be deemed unavailable if legal redress may be obtained only by commencement of multiple actions, such as when the defendants repeatedly commits allegedly harmful acts. Further a plaintiff may demonstrate a lack of an adequate remedy at law by showing that the awarding of damages by an alternative remedy may be insufficiently compensatory in light of the harm caused by defendant's conduct. ... Multiple actions necessary for legal remedy. See *Lee v. Bickell*, 292 U.S. 415, 421, 54 S. Ct. 727, 78 L. Ed. 1337 (1934) (necessity for multiplicity of actions for legal remedy was sufficient to uphold injunction); *Ecolab, Inc. v. Paolo*, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) ("If plaintiff can receive legal relief only through a multiplicity of lawsuits, plaintiff has suffered irreparable harm sufficient to warrant a preliminary injunction".). ... Repeated harmful actions. See, e.g., *Northeast Women's Ctr., Inc., v. McMonagle*, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) ("The legal remedy is inadequate if the plaintiff's injury is a continuing one, where the last available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew."). ... Potential damage award insufficient to be deemed adequate remedy at law. See *Peabody Holding Co. v. Costain Group PLC*, 813 F. Supp.

1402, 1421 (E.D. Mo. 1993) ("Improper conduct for which monetary remedies cannot provide adequate compensation is sufficient to establish [irreparable] harm".)." 13 Moore's Federal Practice, § 65.02 [2] (Matthew Bender 3d ed.). ...

The preceding cases are applicable and dispositive, for in fact, plaintiff of necessity has had to commence multiple actions which have been necessary for an appropriate legal remedy, for in fact the injury is a continuing one and there have been repeated harmful actions, and in fact the potential damage award is totally insufficient to be deemed an adequate remedy at law, since every time there is a vacancy and a job vacancy announcement in the federal government, and every time that there is recruitment for a federal government job, and every time that plaintiff is searching for a federal government job, and every time that plaintiff has in fact applied for a federal government job, and every time that plaintiff will apply for federal government employment, leading all the way up to every time there is actually a selection for a federal government job, and in fact even every time that there has been a job vacancy announcement and there is not selection from that job vacancy announcement for a federal government job, plaintiff is in effect and in fact being discriminated against because of his race and sex and national

origin and age. This is precisely why plaintiff has in fact been forced to already commence multiple actions in this federal court, and why plaintiff will in fact be forced to commence even more multiple actions in this federal court. In addition, the rather artificially limited and minimal monetary amounts presently recoverable under Title VII are insufficient and inadequate and thus demonstrate a lack of an adequate remedy at law, besides which this is a violation of the Constitution of the United States itself, and not just a statutory violation of Title VII. ...

"***Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169-170 (11th Cir. 1988) (district court abused its discretion in denying motion for preliminary injunction without evidentiary hearing because, in Title VII (42 U.S.C. §§ 2000e-2000e-17) actions, irreparable harm is presumed** and hearing would have determined whether defendant could have overcome presumption and whether plaintiff had met other requirements for injunction)." 13 Moore's Federal Practice, § 65.21 [1] (Matthew Bender 3d ed.). ...

"Presumption of irreparable injury in other civil rights cases. ... *Able v. United States*, 847 F. Supp. 1038, 1043 (E.D.N.Y. 1994) ("[P]ossible violation of constitutional

rights [under Fifth and First Amendments] constitutes irreparable harm."). *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) ("Victims of discrimination suffer irreparable injury, regardless of pecuniary damage."). *Gresham v. Windbrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.), cert. denied, 469 U.S. 882 (1984) (housing discrimination "almost always results in irreparable injury"). 13 Moore's Federal Practice, § 65.22 [4] (Matthew Bender 3d ed.). ...

"Although the court in a civil rights action will more closely scrutinize the facts before deciding whether a preliminary injunction is the appropriate remedy, an injunction will be granted when necessary to protect and preserve basic civil rights. Likelihood of success on the underlying civil rights claim must be established, but will usually be found when the defendant's proposed actions will clearly violate constitutionally protected rights. ... Injunction will be granted when necessary to protect basic civil rights. See *Clemens v. Board of Educ.*, 228 F.2d 853, 857 (6th Cir.), cert. denied, 350 U.S. 1006 (1956) (injunction will issue to protect and preserve basic civil rights)." 13 Moore's Federal Practice, § 65.22 [4] (Matthew Bender 3d ed.). ...

The following quotations are from *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991), which is also favorable to plaintiff:

"The standard for preliminary injunctions is established in this Circuit by *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). *Blackwelder* clarified that a hardship balancing test applies to determine the granting or denial of a preliminary injunction. See *L.J. By and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989). Four factors must be considered: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. *Massinga*, 838 F.2d at 120. The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, see *Merrill Lynch*, 756 F.2d at 1054, a preliminary injunction will be granted if "the plaintiff has raised serious questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation". *Blackwelder*, 550 F.2d at 195; see *Todd by Todd*

v. Sorrell, 841 F.2d 87, 88 n.2 (4th Cir. 1988). As the balance tips away from the plaintiff, a stronger showing on the merits is required. See *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980)." ...

As per the cited relevant cases, plaintiff has more than adequately met the irreparable injury criteria for the granting of an injunction dealing with the violation of his basic civil rights and the violation of his constitutional rights. The injury which is being suffered by plaintiff because of the violation of his basic civil rights and the violation of his constitutional rights outweighs any harm which granting the injunctive relief would inflict on the defendants, especially since the effect of the preliminary injunction would be merely to prevent future illegal and unconstitutional conduct by defendants in which they are presently engaging which cannot even be considered as a harm being inflicted on the defendants in the first place. Since all of the relevant recent civil rights cases have basically stated that so called affirmative action programs are discriminatory and illegal and unconstitutional, the relevant recent case law itself is what demonstrates and exhibits plaintiff's likelihood of success on the merits relating to the issues being presented in the preliminary injunction more than anything else. The public interest will not

be adversely affected by the granting of the injunction, for the enjoining of discriminatory and illegal and unconstitutional behavior is in itself ultimately in the public interest, and cannot possibly be construed as adversely affecting the public interest.

DECLARATORY JUDGMENT

PARTIAL SUMMARY JUDGMENT

STATUTES, REGULATIONS, RULES, AND PROCEDURES OF FEORP AND AEP

Exclusion of relevant qualifications from consideration for Federal Equal Opportunity Recruitment Program (FEORP) designated job openings to greatly increase the probability of a minority or woman to be evaluated as being highly qualified and to be selected for the openings, and to correspondingly greatly decrease the probability of a white male, especially one over forty years of age and of Hungarian origin, to be evaluated as being highly qualified and to be selected for the openings, is discriminatory. ...

Failure of NIH OEO under Naomi Churchill, Diane Armstrong, and Linda Morris to comply with mandatory 30 day processing time for informal EEO complaint is a violation of 29 C.F.R. §1614. ...

Failure of DHHS and NIH OEO under Naomi Churchill, Diane Armstrong, and Linda Morris to comply with mandatory 180 days for completion of investigation of formal equal employment opportunity complaint is a violation of 29 C. F. R. §1614. ...

Failure of defendants to seriously consider, interview, or select plaintiff for Federal Equal Opportunity Recruitment Program (FEORP) designated job openings and benefits was discriminatory. ...

Preferences and favoritism for minorities and women under the Federal Equal Opportunity Recruitment Program (FEORP) and the Affirmative Employment Program (AEP), and the creation of barriers to the selection, hiring, and promotion of white males, especially those most qualified and over forty years of age, are discriminatory. ...

The Equal Employment Opportunity Commission's responsibilities under Gilbert Casellas to establish and maintain discriminatory affirmative action programs for minorities and females, and the EEOC's dual mutually exclusive function to ensure real equal employment opportunity regardless of race or sex or national origin or age, represent a conflict of interest, have the appearance of partiality, prejudice, and bias, and are discriminatory against caucasian

males. ...

Federal government officials' responsibilities, such as Harold Varmus, Ruth Kirschstein, Bernadine Healy, Richard Klausner, Edward Sondik, Philip Amoruso, Alan Rabson, Maxine Richardson, Sandra Thomas, Marianne Wagner, and Susan Cory to establish and maintain discriminatory affirmative action programs for minorities and females, under the pretext of "diversity", and their dual mutually exclusive functions to ensure real equal employment opportunity regardless of race or sex or national origin or age, represent a conflict of interest, have the appearance of partiality, prejudice, and bias, and are discriminatory against caucasian males. ..;

Federal Equal Opportunity Recruitment Program (FEORP) and Affirmative Employment Program (AEP) requirements for the justification and approval of the selection of the best qualified white male, but not for the selection of even minimally qualified minorities and females, and the mandatory classification of candidates by race and gender, are discriminatory. ...

Selection by the FEORP Operations Coordinator under the Federal Equal Opportunity Recruitment Program (FEORP) of qualifications review board members, who

evaluate and refer eligible candidates for selection, who are themselves minorities and women, and who would promote the selection of minorities and women and the nonselection of white males such as plaintiff, is discriminatory. ...

Violation of the requirement to rank or group candidates and refer only a reasonable number, normally 3 to 5, of the best qualified candidates for selection, and in fact in two job vacancy announcements referring a total of sixty two and sixty nine supposedly "best qualified" candidates to the selecting official, in order to give preference and favoritism to minimally qualified minorities and females, is discriminatory against the best qualified white males. ...

City of Richmond v. J.A. Croson Company

Relevant Cases Before Adarand

Adarand Constructors, Inc. v. Pena

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal

footing." General Contractors v. Jacksonville, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., at ---, 113 S.Ct., at 2303. ...

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." (Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2110-2112.) ...

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."(Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2112-2114.) ...

Relevant Case Law Since Adarand

CONCLUSION

Wherefore, Plaintiff hereby makes an application to the court for an order for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for an order for declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for an order for partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of any of the National Institutes of Health so called affirmative action programs for minorities or females or hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), and b) that the means employed by any of the National Institutes of Health (NIH) so called affirmative action programs for minorities or females or hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), are not narrowly tailored

measures, and Plaintiff further seeks to enjoin and prohibit the use of the National Institutes of Health (NIH) so called affirmative action programs based on race or gender or national origin on any of the elements of the National Institutes of Health (NIH) so called affirmative action programs or NIH FEORP or NIH AEP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), which are specifically mentioned in PJM-96-2913, including but not limited to: Violations of the Requirement to Rank or Group Candidates and Refer Only a Reasonable Number (Normally 3 to 5) of the Best Qualified Candidates for Selection Because of the NIH FEORP or the NIH AEP; the Different Method of Selection under the NIH FEORP or the NIH AEP of Qualifications Review Board Members Who Evaluate and Refer Eligible Candidates for Selection; the NIH FEORP or the NIH AEP Requirement for the Justification and Approval of the Selection of the Best Qualified White Male, but not for the Selection of Even Minimally Qualified Minorities and Females; the Mandatory Classification of Candidates by Race and Gender under the NIH FEORP or NIH AEP; the Federal Government Officials' Responsibilities to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females and Hispanics under the NIH FEORP or the NIH AEP, and their Dual Mutually Exclusive Functions to Ensure Real Equal Employment

Opportunity Regardless of Race or Sex or National Origin or Age; the Equal Employment Opportunity Commission's (EEOC's) Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the NIH FEORP or NIH AEP; the Failure of the NIH to Seriously Consider, Interview, or Select White Males for the NIH FEORP or NIH AEP Designated Job Openings; and the Exclusion of Relevant Qualifications from Consideration for NIH FEORP or NIH AEP Designated Job Openings.

Wherefore, Plaintiff hereby makes an application to the court for an order for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for an order for declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for an order for partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the federal government Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Plaintiff further seeks

to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), programs of the United States federal government, including but not limited to: The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c); the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender and National Origin, including but not limited to, Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women, Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, and Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force; the Equal Employment Opportunity Commission's Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the Federal Equal

Opportunity Recruitment Program FEORP and the Affirmative Employment Program AEP; the Failure of the United States Government to Seriously Consider, Interview, or Select White Males for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; the Exclusion of Relevant Qualifications from Consideration for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; and the Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program (FEORP).

APPENDIX JJ

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * *

	*Mailed
FRANK PAUL LUKACS	*09/09/98
	*
Plaintiff	*
	*Civil No.
v.	*PJM-97-379
	*
DONNA E. SHALALA, et al.	*Civil No.
	*PJM-97-3359
Defendants	*
	*Civil No.
* * * * * * * * * * * * * * * *	*PJM-97-3495

ORDER

After a review of the various causes of action set forth in the complaints in the captained cases, the Court finds them to be duplicative of claims set forth by Pro Se Plaintiff Lukacs in two other cases before this Court. Civil Action No. PJM 96-2913 and Civil Action No. PJM-97-3483. Accordingly, it is this 31st day of August, 1998

ORDERED that Civil Action No. PJM-97-379, Civil Action No. PJM 97-3359, and Civil Action No. PJM-97-3495 are hereby DISMISSED; and it

is further

ORDERED that all pending Motions are hereby rendered MOOT.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX KK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*09/18/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-96-2913

* * * * * * * * * * * * * * * *

ORDER

It is this 18th day of September, 1998, ORDERED that the time for the Defendants to answer, move, or otherwise plead to Plaintiff's Amended Complaint is extended through and including September 30, 1998.

Signature of William Connelly

_____

William Connelly
United States Magistrate Judge

cc: Judge Peter Messitte

APPENDIX LL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*09/17/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-97-3483

* * * * * * * * * * * * * * *

The Clerk received your "Motion for Leave" [and] "Amended Complaint" on 9/15/98; however, it is deficient in the areas checked below:

Pursuant to the verbage [sic] in attached Memorandum Opinion and Order (signed by Judge Peter J. Messitte, dated September 8, 1998), [and not filed until September 15, 1998], no further pleadings are to be filed.

The Clerk is directed to return the above paper(s) to counsel.

Very truly yours,

Signature of Peter J. Messitte, Jr.

_____

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX MM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*10/08/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-96-2913

* * * * * * * * * * * * * * * * *

PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE RULE 55

Plaintiff respectfully submits this motion for judgment by default according to Federal Rules of Civil Procedure Rule 55.

The reasons for this motion for judgment by default are set forth in the accompanying memorandum.

Respectfully submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX NN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*10/08/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-96-2913

* * * * * * * * * * * * * * *

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE RULE 55

Plaintiff filed his "Amended Complaint" on September 08, 1998.

As the record of the clerk of the court itself demonstrates, the "Amended Complaint" was mailed to Earle B. Wilson, Assistant United States Attorney, 6625 United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201-2692, who was at that time representing and continues to the present to represent all of the defendants, including Donna E. Shalala, Secretary of the Department of Health and Human Services, as well as all of the individual defendants, on September 08, 1998.

Thus defendants had a total of thirteen

days from September 08, 1998 to "plead in response to an amended pleading", namely until September 21, 1998.

An order was entered in PJM-96-2913 by the United States Magistrate Judge which stated that "It is this 18th day of September, 1998, ORDERED that the time for the Defendants to answer, move, or otherwise plead to Plaintiff's Amended Complaint is extended through an including September 30, 1998".

As the record of the clerk of the court itself demonstrates, defendants have not answered, moved, or otherwise plead to Plaintiff's Amended Complaint by September 30, 1998.

The civil docket for case number PJM-96-2913 as of October 06, 1998 1:03 PM does not indicate that defendants have submitted anything in PJM-96-2913 since September 01, 1998. Defendants did not "plead in response to an amended pleading" by September 30, 1998. Thus the time for them to "plead in response to an amended pleading" had expired at the latest on September 30, 1998 without their having filed anything on their behalf, not even the filing of a motion for enlargement of time to respond to the complaint.

Thus although defendants only had until at the latest September 30, 1998 to "plead in response to an amended pleading", defendants did not even bother to file a motion for enlargement of time to respond to the complaint by September 30, 1998, and in fact

defendants to this date have not "plead in response to an amended pleading". ...

The reality of the situation is that in this case the defendants have now several times completely ignored the Federal Rules of Civil Procedure. The Department of Justice under this present administration is of course going to defend every and any element of so called affirmative action programs and every and any person who has done anything in furtherance of these so called affirmative action programs, no matter that what was done may have been illegal or unconstitutional. The defaulting defendants entire attitude to date has been that only if and when a federal court actually orders them to process and investigate Plaintiff's challenges to their discrimination and so called affirmative action programs and their retaliation and reprisal and harassment and creation of a hostile working environment and constructive discharge will they actually ever follow the mandatory rules and regulations. The defaulting defendants for years now have been acting in bad faith regarding the processing and investigation of Plaintiff's equal employment opportunity complaints and have been using dilatory tactics during the informal stage in front of the National Institutes of Health, during the formal stage in front of the Department of Health and Human Services, and during the appeal stage in front

of the Equal Employment Opportunity Commission, so it is not at all surprising that they would continue their same delaying and bad faith tactics now in federal court. The real question is whether or not the defaulting defendants underlying assumption is correct in that a federal court judge appointed by a pro affirmative action administration will let the defaulting defendants now continue to let them get away with their delaying and bad faith tactics. At the minimum the court's action will demonstrate Plaintiff's claim of the court's double standard regarding adherence to the relevant rules and regulations by a pro se plaintiff who readily admits that he is neither knowledgeable nor competent in their content much less their application, versus adherence to the relevant rules and regulations by the Department of Justice who are most knowledgeable and extremely competent in their misuse to their own benefit via dilatory tactics and bad faith which they have already previously demonstrated.

The reality of the matter is that a delaying tactic like this done in bad faith allows the so called affirmative action programs not only to continue unabated to the great prejudice of Plaintiff, but in fact allows these so called affirmative action programs to actually grow and become even more encompassing during this purposeful delay. At the rate of these delays, Plaintiff will be

long dead and buried before this court will ever even get around to addressing the issue, which is precisely the intent of the delay. ...

"The government has been severely criticized for abusing Rule 55(e) by its persistent failure to adhere to procedural requirements. ... See *Giampaoli v. Califano*, 628 F.2d 1190, 1195 n.12 (9th Cir. 1980) ("HEW has been almost singly responsible for the development of the jurisprudence of rule 55(e)"); *Santiago v. Secretary of Health, Education & Welfare*, 82 F.R.D. 164, 166 (D.P.R. 1979), rev'd on other grounds, 622 F.2d 1044 (1st Cir. 1980) ("the Secretary's systematic record of flagrant disobedience to judicial authority and obstinate abuse of this Court's leniency ...")." ...

Plaintiff would be greatly prejudiced if the federal government could so easily totally ignore not only plaintiff as they have been doing for years now, but the very rules and regulations and procedures for which they have continued for years now to express nothing but utter contempt and complete disrespect, while at the same time constantly threatening plaintiff that if plaintiff should ever miss any deadlines by even so much as one day that plaintiff's equal employment opportunity

complaints would be summarily dismissed permanently according to the very rules and regulations and procedures which they themselves have consistently for years now totally ignored and refused to follow. For this court and this federal court judge to allow this to happen in the name of justice would in itself be an injustice. ...

Here there has been no mistake, there has been no inadvertence, there has been no surprise, and there has been no excusable neglect. Quite the contrary, the defaulting defendants knew exactly what they were doing, and they were betting on being able to get away with filing nothing by September 30, 1998 with this court and this judge and that they would have to do nothing by September 30, 1998 and that there would be no consequences to their decision and of their intentional actions. The reality of the matter, and the inherent unfairness in this double standard, is that if plaintiff even though pro se had similarly missed the deadline date to plead or otherwise defend, plaintiff has no doubt that he would by now have in effect had his entire case thrown out of court by a quick judgment by default. ...

Apart from all of the previously cited case law, the reality of the situation is the

double standard which is being applied in this court, whereby any supposed procedural even local rule error of pro se plaintiff of which he is unaware is going to be fatal to plaintiff's cause of action since he is being held to a high rigorous standard, whereas any even purposeful violation of the very essence of the Federal Rules of Civil Procedure itself by the defendants' most legally experienced team of attorneys in this nation is going to be simply overlooked since they are being held to a less rigorous standard, which rather ironically is the essence of the discrimination inherent in so called affirmative action itself in that plaintiff as a white male is being held to a high rigorous standard whereas others of different race and gender at the same time are being held to a less rigorous standard. Both of these situations seem rather unfair to plaintiff.

...

Respectfully Submitted,

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX OO

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770

MEMORANDUM

TO: Frank Paul Lukacs

FROM: Judge Peter J. Messitte

RE: Lukacs v. Shalala

Civil No. PJM-96-2913

Date: October 13, 1998

The Court notes that Plaintiff has recently filed several pleadings, despite the Court's Order of June 30, 1997 directing the parties to file no further motions until the Court rules on Defendant's pending Motion to Dismiss or in the Alternative for Summary Judgment. **The Court will not consider these motions, docketed Papers 70, 71, 72, 74, 75, and 86.** These pleadings are all deemed DENIED without prejudice.

Any attempt of Plaintiff to file further pleadings until the Court's ruling on said Motion to Dismiss or in the Alternative for Summary Judgment will be made at the risk of sanctions.

The Clerk of this Court will be directed to not docket any more pleadings by Plaintiff until the Court's ruling on said motion.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX PP

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*10/20/98
FRANK PAUL LUKACS	*USCAF Docket #
Plaintiff	*98-2537
v.	*
DONNA E. SHALALA, et al.	*District Court #
Defendants	*CA-96-2913-PJM
* * * * * * * * * * * * * * *	

IN RE FRANK PAUL LUKACS, PETITIONER
PETITION FOR A WRIT OF MANDAMUS

The district court on June 30, 1997 ordered "the parties are directed to file no further motions", on September 08, 1998 ordered that "neither party shall file further pleadings in this Court", and on October 13, 1998 ordered that "The Clerk of the Court will be directed to not docket any more pleadings". ...

A COURT HAS NO POWER TO PREVENT A PARTY FROM FILING PLEADINGS, MOTIONS, OR APPEALS AUTHORIZED BY THE FEDERAL RULES OF CIVIL PROCEDURE

"While a judge may require parties to confer before filing a motion, the judge may not, by failing to hold a conference, prevent

parties from filing. *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987)." *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 102, §7.3.

"A court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, at 652 (2d Cir. 1987).

A quick check in Westlaw will confirm that the above quotation from the Second Circuit Court of Appeals (thereby satisfying the situation that "the opinion is in conflict with another decision ... of another court of appeals and the conflict is not addressed in the opinion") has been quoted in over 200 separate cases and that this holding has been favorably cited in over 250 cases.

As an example, the first of over 250 citations in Westlaw regarding the above quote is from the United States Court of Appeals for the Federal Circuit decision in *In re Halliburton Co.*, 991 F.2d 810, 1993 WL 118929, (Fed.Cir.(Tex.), March 12, 1993), in which the district court, (very similar to the case before us),

"ordered that: no party in this case file anything further before this Court" ... "the filing of anything further in this Court, in

the absence of the exhaustion of such appellate scrutiny, will constitute an act of contempt, for which appropriate sanctions will issue."

The United States Court of Appeals for the Federal Circuit stated:

"In *Richardson [Greenshields Securities, Inc., v. Lau*, 825 F.2d 647 (2d Cir. 1987)], the Second Circuit stated that absent extraordinary circumstances, **"a [district] court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure."** *Richardson*, 825 F.2d at 652. We are in agreement with this principle. Accordingly, it is ordered that: Halliburton's petition is granted. The District Court's order is vacated and the district court is directed to allow the filing of motions authorized by the Federal Rules of Civil Procedure."

The following is a typical quotation from the 255 Westlaw citations, being from *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1256 (2nd Cir.(N.Y.) 1996):

"We have previously emphasized that **a district court "has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure."** *Richardson Greenshields Securities, Inc., v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987)."

In *Milltex Industries Corp. v. Jacquard Lace Co., Ltd.*, 55 F.3d 34, at 39 (2nd Cir.(N.Y.) 1995) the appellate court stated:

"**"A court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure."** *Richardson Greenshields Securities, Inc., v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987). Although it is within the judge's discretion to hold a pre-motion conference for the purpose of persuading a party not to file a perceived meritless motion, see id. ("We do not suggest that district judges cannot require a conference prior to the filing of motions as a means of managing litigation assigned to them."), the judge may not require that the court's permission be secured at such a conference before a party may file the motion."

In *Schoenberg v. Shaposlky Publishers, Inc.*, 971 F.2d 926, 936 (2nd Cir.(N.Y.) 1992), the appellate court stated:

"As we explained in *Richardson Greenshields Securities, Inc., v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987), "absent extraordinary circumstances ... **a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure**". Whenever a court directs a lawyer that he or she may not make a motion, it is in effect cutting the lines of communication between the

court and the litigants. This elimination of dialogue can result, as in the case here, in the multiplication of proceedings, especially when a party is seeking to raise a threshold issue."

"We may in appropriate circumstances treat an attempted appeal as a request for leave to file a petition for a writ of mandamus. [citations omitted] We believe that this is such an appropriate circumstance. ... Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, see *In re Martin-Trigona*, 737 F.2d 1254, 1261-1262 (2d Cir. 1984), or a failure to comply with sanctions imposed for such conduct, *Johl v. Johl*, 788 F.2d 75 (2d Cir. 1986) (per curium), a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, at 652 (2d Cir. 1987).

Plaintiff-Appellant has been in effect precluded from any meaningful action in the court proceedings or any meaningful "access to the court system", Moy v. United States, 906 F. 2d 467, 470 (9th Cir. 1990). Appellant has in effect had his "constitutional right of access to the courts", (Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct. 1491, 1994, 52 L.Ed. 2d 72 (1977)) and "his right to adequate, effective, and meaningful access", (Bounds,

430 at 822, 97 S.Ct. at 1495) to the courts curtailed and abridged. "It sanctions access restrictions that standing alone might or might not be objectionable but which "taken together [are] so burdensome as to deny the litigant meaningful access to the courts", In re Green, 669 F. 2d 779, at 786, (D.C.Cir. 1981) (per curiam); Abdullah v. Gatto, 773 F.2d 487, at 488 (2d Cir. 1985) (per curiam)", Procup v. Strickland, 792 F.2d 1069, at 1078 (11th Cir. 1986) (en banc, per curiam).

FEDERAL RULES OF CIVIL PROCEDURE RULE 42
When Actions Involving a Common Question of Law or Fact Are Pending Before the Court

FEDERAL RULES OF CIVIL PROCEDURE RULE 15
A Party May Amend the Party's Pleading Once as a Matter of Course At Any Time Before a Responsive Pleading Is Served

Contrary to the specific "Memorandum Opinion and Order" of the Court dated June 30, 1997 in PJM-96-2913, which for some reason or other was not even mailed until July 07, 1997, in which the United Stated District Judge stated that "the parties are directed to file no further motions", and the "Memorandum" from the United States District Judge dated July 23, 1997 which again reiterated that "the Court, among other things, directed the parties to file no further motions", the

Defendants through their representatives the Department of Justice nevertheless filed a motion on September 01, 1998, (See Exhibit "26" of the attached declaration) which motion by the way was even granted by the Court (See Exhibit "26" of the attached declaration). ...

Plaintiff to date has not filed any motions in PJM-96-2913. Plaintiff instead of directly challenging the authority of the court directing the parties to file no further motions by actually filing a motion merely appealed the order of the United States District Judge, to use the words of the United States Court of Appeals for the Fourth Circuit "directing the parties to file no further motions", to the United States Court of Appeals for the Fourth Circuit. ...

The Fourth Circuit dismissed "the appeal of the remaining orders for lack of jurisdiction because the orders are not appealable" and "the orders here appealed are neither final orders nor appealable interlocutory or collateral orders". Plaintiff filed a petition for rehearing and suggestion for rehearing en banc, which were denied. Plaintiff filed a motion for a stay of the mandate which was denied without comment. Plaintiff timely filed a petition for a writ of certiorari to the Supreme Court of the United States. ...

On April 03, 1998 plaintiff filed a petition with the United States Court of Appeals for the Fourth Circuit for a writ of

mandamus making an application to the court for an order that the district court be directed to allow the filing of motions. ... Plaintiff's motion for rehearing and suggestion for rehearing en banc were denied on August 10, 1998, paving the way for a conflict among the circuits, with the Fourth Circuit Court of Appeals all alone on one side and every other Circuit Courts of Appeal to have actually considered the issue on the other side. ...

If plaintiff had knowingly purposefully violated the order and filed a motion, plaintiff would have been thrown out of court and thrown into jail. However, if defendants can now with complete impunity violate the direct order of the district court judge not to file any motions, then perhaps in all fairness plaintiff should now be permitted to also file motions. ...

The reality of the situation is the double standard which is being applied in this court, whereby any supposed procedural even local rule error of pro se plaintiff of which he is unaware is going to be fatal to plaintiff's cause of action since he is being held to a high rigorous standard, whereas any even purposeful violation of the very essence of the Federal Rules of Civil Procedure or even a direct violation of an order of the court by the defendants' most legally experienced team of attorneys in this nation is going to be simply overlooked since they

are being held to a less rigorous standard, which rather ironically is the essence of the discrimination inherent in so called affirmative action itself in that plaintiff as a white male is being held to a high rigorous standard whereas others of different race and gender at the same time are being held to a less rigorous standard. Both of these situations seem rather unfair to plaintiff." ...

The preceding examples however were just a prelude of what was to come. In a "memorandum opinion and order" of the United States District Court for the District of Maryland which was supposedly dated September 08, 1998, but which was not actually mailed from the office of the U.S. District Judge's office until September 14, 1998, PM no less, the Court in PJM-97-3483 ordered that "neither party shall file further pleadings in this Court".

FEDERAL RULES OF CIVIL PROCEDURE RULE 15
Leave Shall Be Freely Given When Justice So Requires

PLAINTIFF'S RIGHT TO FILE PLEADINGS
According to the Federal Rules of Civil Procedure and According to 29 C.F.R. § 1614

For the court to state that "neither party shall file further pleadings in this Court" deprives plaintiff-appellant of his

right according to 29 C.F.R. § 1614 "to file a civil action in an appropriate United States District Court" "within 90 days of receipt of the final decision on an individual complaint" or "within 90 days of receipt of the Commission's final decision on an appeal", on any presently pending EEO complaint of plaintiff-appellant, which this district court simply has no power to do. ...

FEDERAL RULES OF CIVIL PROCEDURE RULE 55 Failed to Plead or Otherwise Defend as Provided by These Rules

The district court judge is employing a double standard and is not being fair or just and does not even have the appearance of impartiality. As plaintiff-appellant has stated repeatedly:

"Thus defendants have constantly purposefully missed their long 30 day and 180 day deadline dates, and yet would turn around and nevertheless threaten plaintiff with "dismissal of the complaint due to untimely filing" if he ever even once missed his deadline date of "fifteen calendar days from the date of receipt". So what is going to happen now when defendants have been constantly missing their deadline dates in federal court, and now even directly violating an order of the court? Will defendants be held by this court to the same standard as plaintiff has been held by this court all this

time?

Sounds like a double standard to plaintiff, both by the agency, and by this court. Plaintiff pro se is expected to abide by local rules of which he is unaware, but defendants even if represented by none other than the Department of Justice do not feel that they have to abide by even the Federal Rules of Civil Procedure or direct orders of the federal district court judge. It seems that only plaintiff has to follow even the applicable local rules and regulations, but that defendants do not have to even follow the applicable federal rules and regulations. But then again since defendants feel that they can with complete impunity totally purposefully ignore the mandatory provisions of 29 C.F.R. § 1614 regarding independent investigations and have the district court judge overlook this major infraction of the rules, then why should they not also feel that they can with complete impunity totally purposefully ignore the mandatory provisions of F.R.C.P. Rules regarding the time in which to plead or otherwise defend and have the district court judge repeatedly overlook this major infraction of the rules also. After all it is becoming rather obvious to everyone that it is only plaintiff who has to abide by all of the provisions of 29 C.F.R. § 1614 and the F.R.C.P. and even the local rules, and not defendants. No matter how you slice it, it seems totally unfair to plaintiff. Defendants

can demonstrate utter contempt for this court, not to mention they feel that they can even commit perjury in this court and easily get away with it, and it is plaintiff who is at the same time being admonished for voicing his dissatisfaction with this court's obvious partiality and use of a double standard. This is not fair.

PLAINTIFF'S MOTIONS FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE FOR A PERMANENT INJUNCTION ON THE NATIONAL INSTITUTES OF HEALTH SO CALLED FEORP AFFIRMATIVE ACTION PROGRAMS FOR MINORITIES AND FEMALES AND HISPANICS AND ON THE UNITED STATES FEDERAL GOVERNMENT'S SO CALLED FEORP AFFIRMATIVE ACTION PROGRAMS FOR MINORITIES AND FEMALES AND HISPANICS

The district court dismissed Plaintiff-Appellant's filed and docketed motion for a preliminary injunction or a permanent injunction on the National Institutes of Health's so called FEORP affirmative action programs for minorities and females and the United States federal government's so called FEORP affirmative action programs for minorities and females. However, the district court never addressed any of the required *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-196 (4th Cir. 1977) factors, or any factors for that matter, and violated Federal Rules of Civil Procedure Rule 52(a)

which specifically states that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action", and although the denial of the preliminary injunction is immediately appealable to the Fourth Circuit Court of Appeals, this court has even denied plaintiff-appellant the right to file a notice of appeal. ...

"After providing that in all non-jury actions tried upon the facts, the court shall find the facts specially and state separately its conclusions of law thereon, Rule 52(a) goes on to state that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". And the appellate court is normally justified in vacating the order and remanding for fuller explanation where the trial judge's findings and conclusions lack specificity. *Schmidt v. Lessard*, 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (citing Moore's)." *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 700, §65.7.

APPENDIX QQ

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2537

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Writ of Mandamus.
(CA-96-2913-PJM)

Submitted: November 17, 1998
Decided: November 30, 1998

Before WIDENER and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Frank Paul Lukacs, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Frank Paul Lukacs filed a petition for a writ of mandamus requesting that this court order the district court: (1) vacate its orders in two of Lukacs' pending civil cases prohibiting the parties from filing further pleadings or motions until the court is able to dispose of motions currently pending; and (2) permit Lukacs to file pleadings, motions, affidavits, and appeals. In this mandamus petition, Lukacs failed to establish that he has a clear right to the relief sought and that no other remedy is adequate. See In re First Fed. Sav. & Loan Ass'n, 860 F.2d 135, 138 (4th Cir. 1988). Further, mandamus may not be used as a substitute for appeal. See In re United States Steelworkers, 595 F.2d 958, 960 (4th Cir. 1979). We therefore grant Lukacs' motion to file an attachment to his petition and deny Lukacs's petition for a writ of mandamus. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX RR

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*01/14/99
FRANK PAUL LUKACS	*USCAF Docket #
Plaintiff	*98-2537
v.	*
DONNA E. SHALALA, et al.	*District Court #
Defendants	*CA-96-2913-PJM
* * * * * * * * * * * * * * *	

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

The reality of the matter is that, according to the results of Petitioner's computer legal database search, every Court of Appeals to have thus far considered the issue, and there are over two hundred such cases, has reaffirmed that **absent extraordinary circumstances a court has no power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure (FRCP)**, and has therefore ordered that parties be permitted to file pleadings, motions, and appeals authorized by the FRCP, absent extraordinary circumstances, (which no one to date, not even the district court judge who initially signed the orders in question, has even remotely intimated that such extraordinary circumstances are anywhere near

the case here).

In fact the Court of Appeals for the Fourth Circuit in its very decision trying to justify its judgment, by its very silence on the topic, and even with more legal knowledge and expertise and capability at doing computer legal database searches, apparently could not find even one appellate court decision which did not come to the conclusion that **absent extraordinary circumstances a court has no power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the FRCP**.

The only thing that the Court of Appeals for the Fourth Circuit was able to come up with was that "In this mandamus petition, Lukacs failed to establish that he has a **clear right** to the relief sought and that no other remedy is adequate." But the reality of the matter is that every other Court of Appeals starts off with the basic proposition that all parties have a **clear right to the filing of all pleadings, motions, affidavits, and appeals authorized by the FRCP**, and that absent extraordinary circumstances a court has no power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the FRCP. Since there are no substitutes for pleadings, motions, affidavits, or appeals authorized by the FRCP within the U S district courts, and since the U S district courts themselves have a monopoly on the federal judicial system, the reality of

the matter is that no other remedy is anywhere near or even remotely close to being adequate.

The Court of Appeals appears reticent at granting a writ of mandamus permitting Appellant to file further pleadings, motions, affidavits, and appeals, especially for an Appellant who is after all Pro Se, even though the district court has, in the words of the district court itself, since Appellant "in fact possesses a juris doctor degree" denied Appellant pro se statûs, and the district court has even in writing referred to Appellant as being only "technically pro se", and that "Plaintiff in this case merits no special solicitude" accorded "pro se litigants", and that Appellant was not going to be held to "less stringent standards than trained attorneys". Thus on the one hand the district court is holding Appellant to the "stringent standards of trained attorneys when preparing and filing their pleadings", but on the other hand the district court will not permit Appellant the **clear right** of trained attorneys to file further pleadings, motions, affidavits, and appeals authorized by the FRCP. The Fourth Circuit Court of Appeals on the other hand is clearly treating Appellant as Pro Se, starting with its "Order to Proceed on Informal Briefs", which states "Pursuant to Local Rule 34(b), this case shall be submitted on informal briefs", with Rule 34(b) being invoked "whenever any pro se appeal is filed". Thus Appellant loses every which way. The

district court will burden Appellant with the "stringent standards of trained attorneys when preparing and filing their pleadings", but will not grant Appellant the benefit of trained attorneys of being allowed to file pleadings, motions, affidavits, or appeals authorized by the FRCP. The Fourth Circuit Court of Appeals on the other hand will burden Appellant with the Pro Se designation and procedures, and therefore is hesitant to allow Appellant as a Pro Se the benefit of trained attorneys of being allowed to file pleadings, motions, affidavits, or appeals, even those specifically authorized by the FRCP. ...

The reality of the matter is that the issues presented by petitioner regarding the legality and constitutionality of the so called FEORP and AEP affirmative action programs for minorities and females and hispanics, and the corresponding negative action programs against white males, are not only legal ones but are also political issues presently dividing this nation, and even the Supreme Court itself. Thus it is only natural for a district court judge appointed by President Clinton, the most vocal supporter of these discriminatory action programs for minorities and females and hispanics, simply because it is in his political interests to side with the numerical majority of voters, to do everything procedurally, which misuse of procedure the district court judge has been employing via repeated sua sponte orders which

even the Department of Justice (DOJ) has not dared even suggest much less request, especially since petitioner has merely been following the specific directions and instructions of none other than Defendants regarding the substance of the district court judge's sua sponte orders, to make sure that petitioner loses and that Defendants win. Unfortunately, since this is petitioner pro se's first federal court complaint, although readily admitting that he is legally inexperienced for the task at hand to the point at times of sheer incompetence, he has been able to keep up with the DOJ, and in fact file motions for default judgment in four civil actions, petitioner pro se when pitted against the district court judge who is supposed to be detached and impartial but who has basically taken over the representation of the case for the Defendants, simply needs at the minimum to be able to file pleadings and motions and affidavits and appeals to defend himself, and establish the record for appeal, which this district court judge has simply refused for those very reasons to allow petitioner. The reality of the matter is that the district court judge refused to even allow petitioner to file much less seriously consider his motion to consolidate his five federal court civil actions "involving a common question of law or fact pending before the court", or for petitioner "to amend the party's pleading once as a matter of course at

any time before a responsive pleading is served" without a motion to amend, which motion of course petitioner was not permitted to file, or to file a motion for a preliminary injunction on the National Institutes of Health so called FEORP and AEP affirmative action programs for minorities and females, regarding which motions even if filed and docketed, in the words of the district court judge as late as October 13, 1998 "The Court will not consider these motions". ...

"The movant's ability to obtain summary judgment will, however, vary according to the pleadings. ... The claims and defenses at issue also determine what constitutes relevant evidence supporting or opposing summary judgment." 11 Moore's Federal Practice, § 56.30 [8] [a] [i] (Matthew Bender 3d ed. 1997) under section entitled "[a] **Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions** [i] **Pleadings Frame Dispute and Consequently Affect Materiality**".

"Because the volume and nature of claims pleaded can affect summary judgment, a party seeking to avoid summary judgment may profit from amending its complaint to allege additional or different matter." 11 *Moore's Federal Practice*, § 56.30 [8] [a] [iii] (Matthew Bender 3d ed. 1997) under section entitled "[a] Because Pleadings Determine

Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions [iii] Motions to Amend Pleadings May Narrow or Broaden Factual and Legal Questions and Can Therefore Affect Summary Judgment".

Verified pleadings "may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (**verified complaint treated as equivalent of an affidavit on a motion for summary judgment**) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings.

Petitioner's original unverified pleading only recited the facts of a half a dozen of petitioner's individual equal employment opportunity complaints. Petitioner's proposed amended verified complaint recites the facts of about four dozen of petitioner's individual equal employment opportunity complaints, and contains additional claims, including rather reluctantly a claim for a be fired or quit constructive discharge. However, if a Court simply refuses to even allow petitioner to

file or to have docketed or to consider an amended complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means of the pleadings determining the relevance and materiality in litigation, for the contents of the pleadings to influence summary judgment decisions, and for the amended pleadings to broaden the factual and legal questions which can affect summary judgment, which may unfortunately be the real intent behind the order in the first place. ...

"If a party seeking summary judgment desires to use supporting affidavits, they should be served with the motion. And Rule 56(c) states that "[t]he adverse party prior to the day of hearing may serve opposing affidavits". This should be read in conjunction with Rule 6(d) which vests in the court the power to permit opposing affidavits "to be served at some other time"." *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 620, §56.3 [8] Notice; Time for Serving Affidavits.

However, if a Court simply refuses to even allow petitioner to file or have docketed a motion for leave to permit opposing affidavits "to be served at some other time" under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an

effective means to "serve opposing affidavits", which may unfortunately be the real intent behind the order in the first place.

APPENDIX SS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed February 10, 1998
No. 98-2537
CA-96-2913-PJM

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Rehearing
and Rehearing In Banc

Petitioner's petition for rehearing and rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc are denied.

For the Court,
/s/ Patricia S. Connor

CLERK

EXHIBIT TT

Docket Number 98-1821
Received May 11, 1999

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

In Re FRANK PAUL LUKACS,
Petitioner

On Petition for Writ of Mandamus
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF MANDAMUS

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825
Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. Under strict scrutiny, are the racial and gender and national origin classifications of the United States federal government's affirmative action and diversity programs for minorities and females and hispanics narrowly tailored measures that further compelling governmental interests, as per *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523.

II. Is it an abuse of discretion for a district court to order the parties to file no further pleadings or motions or affidavits or appeals authorized by the FRCP or Title VII, or to dismiss and refuse to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP or Title VII, including "amend[ing] the party's pleading once as a matter of course at any time before a responsive pleading is served", or motions to "amend the party's pleading by leave of court ... which shall be freely given when justice so requires", or motions for consolidation in "actions involving a common question of law or fact pending before the court", or motions for a preliminary or a permanent injunction on the racial and gender and national origin classifications of the United States federal government's so called affirmative action and diversity programs?

STATEMENT OF THE CASE

Petitioner from the date of his first Equal Employment Opportunity ("EEO") complaint at the National Institutes of Health ("NIH") in January of 1991, despite his having applied on an average of about once every month for advertised job vacancy announcements and benefits, and having timely filed over sixty separate EEO complaints "within 45 days of the date of the matter alleged to be discriminatory" as per 29 C.F.R. § 1614, on about fifty of which EEO complaints there was never any of the 29 C.F.R. § 1614 mandatory processing and investigation by the agency, (See Appendix D) has never once in all this time ever been selected for a so called affirmative action designated or diversity designated or Federal Equal Opportunity Recruitment Program ("FEORP") designated or Affirmative Employment Program ("AEP") designated job opening or benefit, which are in effect set aside for minorities and women and hispanics, at the NIH, at DHHS, or anywhere else in the entire United States federal government.

Petitioner is a member of a protected group, since petitioner is a white male. Petitioner has applied for numerous job vacancy announcements and benefits. Petitioner was qualified for these numerous job vacancy announcements and benefits.

Petitioner was rejected for these numerous job vacancy announcements and benefits. These positions or benefits either remained open and the employer continued to seek applicants, or else the positions or benefits were given to members outside of the protected group of white males. Petitioner was rejected for these positions or benefits under circumstances giving rise to an inference of unlawful discrimination, in particular all of the circumstances and elements of so called affirmative action programs, diversity programs, FEORP, and AEP.

Defendants have not articulated any, much less any legitimate, nondiscriminatory reason for fifty of the employment actions or denial of benefits. In those few cases where Defendants have articulated reasons for the employment actions or denial of benefits, defendants' reasons were a mere pretext for discrimination or simply not credible.

Petitioner maintains that because he is a caucasian male, and is over forty years of age and is a first generation legal immigrant of Hungarian ancestry, he has been limited to a few job series and benefits which are not affirmative action designated or diversity designated or FEORP designated or AEP designated. He has been forced to follow a career path that is outside of the "mainstream occupations", or highly populous occupations which tend to lead to higher level positions

in the agency.

Unfortunately, the filing of equal employment opportunity complaints of discrimination challenging the legality and constitutionality of such discrimination resulted in numerous instances of retaliation, reprisal, harassment, the creation of a hostile working environment, and as everyone had warned Petitioner aforehand, his eventual quit or be fired constructive discharge. ...

There are many individual elements of the United States federal government's and the National Institutes of Health's so called affirmative action or diversity programs for minorities and females and hispanics. (See Appendix M for a brief summary some of the ones of which Petitioner is aware, without the benefit of the investigations which should have been done by the agency according to 29 C.F.R. § 1614 on fifty of Petitioner's timely filed EEO complaints, {See Appendix D.}, and without the benefit of any discovery at all in federal court.) ...

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents

the plaintiff from competing on an equal footing." *General Contractors v. Jacksonville*, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at ---, 113 S.Ct., at 2303. (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2104-2106.)

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2110-2112.)

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."(*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114.)

APPENDIX UU

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

June 14, 1999

Mr. Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143

Re: In Re Frank Paul Lukacs
No. 98-1821

Dear Mr. Lukacs:

The Court today entered the following order in the above entitled case:

The petition for a writ of mandamus is denied.

Sincerely,

William K. Suter, Clerk

APPENDIX VV

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*10/15/98
	*USCAF Docket #
FRANK PAUL LUKACS	*98-2382
	*98-2383
Plaintiff	*98-2384
	*98-2385
v.	*98-2386
	*
DONNA E. SHALALA, et al.	*CA-96-2913-PJM
	*CA-97-0379-PJM
Defendants	*CA-97-3359-PJM
	*CA-97-3483-PJM
* * * * * * * * * * * * * * *	*CA-97-3495-PJM

PLAINTIFF-APPELLANT'S INFORMAL BRIEF
PURSUANT TO LOCAL RULE 34(B)

... Even assuming that it is appropriate at this early stage, which plaintiff-appellant maintains that it is not, to merely examine and compare nothing but the bare titles of the claims themselves, apart from the different underlying facts and the different underlying factual allegations and the different underlying circumstances and the different underlying transactions and the different underlying series of connected transactions and the different underlying issues and the

different underlying causes of action, in PJM-96-2913, PJM-97-379, PJM-97-3359, PJM-97-3483, and PJM-97-3495 as of the date of the order of August 31, 1998, one can readily see that plaintiff only had claims of retaliation and reprisal, harassment, creation of a hostile working environment, intentional infliction of emotional distress, and constructive discharge in a motion to amend the complaint as of course since a responsive pleading had not been served in PJM-97-379, upon which motion the court had never acted, and in the original complaint and in the amended complaint of PJM-97-3495. The district court judge himself upon closer examination of the headings of the claims themselves after the order of August 31, 1998 realized and in writing on September 29, 1998 in effect admitted that plaintiff-appellant as of August 31, 1998 did not have any claims of retaliation and reprisal, harassment, creation of a hostile working environment, intentional infliction of emotional distress, and constructive discharge in PJM-97-3483 as the district court originally thought on August 31, 1998 upon a mere hasty and superficial and cursory review of the headings of the claims. ...

CLAIM PRECLUSION AND SUPPOSED DUPLICATION OF CLAIMS

The natural end result of the district court's irrational and illogical analysis is

that if plaintiff as a white male files a timely individual equal employment opportunity complaint within forty five days of an event on the basis of race and sex and national origin and age on his nonselection for an affirmative action designated job vacancy announcement with the position being filled by a less qualified minority or female, and then files a federal court complaint on the basis of race and sex and national origin and age on his nonselection for an affirmative action designated job vacancy announcement with the position being filled by a less qualified minority or female, then if months later plaintiff is again rejected for another affirmative action designated job vacancy announcement supposedly because of plaintiff's first federal court complaint plaintiff can never again file another individual equal employment opportunity complaint within forty five days of the event or another federal court complaint on the basis of race and sex and national origin and age on his nonselection for an affirmative action designated job vacancy announcement with the position being filled by a less qualified minority or female for supposedly "the court finds them duplicative of claims". That is entirely unsupported by any case law at all. **This is an attempt at claim preclusion before there has been any *valid final judgment on the merits* on any claim by any court in the first place. Even the "claim preclusion doctrine**

requires a *valid final judgment* that was rendered *on the merits*". 18 Moore's Federal Practice 3D, § 131.30 (Matthew Bender 3d ed.). Even where trial courts raise preclusion issues sua sponte, "the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied. *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (sua sponte application of preclusion not appropriate when court did not allow briefing on issue)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

...

29 C.F.R. § 1614 only talks in terms of "A complainant who has filed **an individual complaint**" and "is authorized under Title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court" and "within 90 days of receipt of the final decision on **an individual complaint**", for all of 29 C.F.R. § 1614 only talks about a complainant's "**individual complaints**", and not about a complainant's "individual claims".

Let us take a simplified hypothetical case, omitting a lot of details for our present purposes of illustration.

1 Suppose a white male plaintiff timely files an individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number one, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

2 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number two, on the denial of some benefits because he is a white male, with that same benefit however being given to minorities and females.

3 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number three, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

4 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number four,

on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

5 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number five, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

6 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number six, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

7 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number seven, on perhaps his nonselection for another affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

8 Then a few months later further

suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number eight, on perhaps retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

9 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number nine, on perhaps additional retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

10 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number ten, on perhaps additional retaliation and reprisal and retaliatory constructive discharge for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

I Then a few months later, or even a few years later, plaintiff having met the procedural time requirements of 29 C.F.R. § 1614 on his fifth individual equal employment complaint, finally files a complaint in federal court, on his fifth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say September 17, 1997, with the civil action number being, let us say hypothetically PJM-96-2913. Plaintiff files his first complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on his nonselection for an affirmative action designated job vacancy announcement with the position having been filled by a less qualified minority or female, as well as challenging the constitutionality of the so called affirmative action statutes, regulations, rules, and procedures.

II Then a few months later, let us say on November 14, 1996, the agency issues a final decision on plaintiff's fourth individual equal employment opportunity complaint. Plaintiff now only has ninety days in which to file a complaint in federal court on his fourth equal employment opportunity complaint. Then later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's second individual equal employment opportunity complaint, let us say on November 19, 1996. Plaintiff, finally having exhausted all of his

administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. Then the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's third individual equal employment opportunity complaint, let us say on December 18, 1996. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. With the first of the three ninety days almost having expired, plaintiff quickly files a complaint in federal court, on his second equal employment opportunity complaint, on his third equal employment opportunity complaint, and on his fourth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say February 06, 1997, with the civil action number being let us say hypothetically PJM-97-379. Plaintiff files his second complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of a benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379. However because of the procedural requirements for filing a civil action in an appropriate United States

District Court, plaintiff could not have filed the contents of PJM-97-379 until November 14, 1997 and had to have filed by February 14, 1997.

III Then a few months later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's sixth individual equal employment opportunity complaint, let us say on July 08, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his sixth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say October 03, 1997, with the civil action number being let us say hypothetically PJM-97-3359. Plaintiff files his third complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3359 until July 08, 1997 and had to have filed by October 08, 1997.

V Then a few months later, the Equal

Employment Opportunity Commission finally gets around to making a decision on plaintiff's eighth individual equal employment opportunity complaint and plaintiff's ninth individual equal employment opportunity complaints, let us say on July 16, 1997, with the agency adopting the EEOC decision as its own agency final decision on August 28, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his eighth and ninth and tenth equal employment opportunity complaints, and let us for the sake of argument pick a date, any date, say October 20, 1997, with the civil action number being let us say hypothetically PJM-97-3495. Plaintiff quickly files his fifth complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age as well as claims for retaliation and reprisal, with the retaliation and reprisal serving as additional evidence of plaintiff's claim of retaliatory constructive discharge. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until August 28, 1997, but had to have filed by November 28, 1997.

VI or III Then a few months later, after having been to the Equal Employment Opportunity Commission four times on plaintiff's first individual equal employment opportunity complaint, plaintiff has a window of opportunity to finally file a civil action in an appropriate United States District Court. Plaintiff in not wanting to file another federal court complaint instead chooses to amend his third federal court complaint PJM-97-3359 with the contents of his first equal employment opportunity complaint on let us say May 27, 1998. Plaintiff now has some additional common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until February 1998.

VII Etcetera.

(Added to this scenario is the fact that plaintiff's first federal court complaint PJM-96-2913 was physically up on appeal at the Fourth Circuit Court of Appeals for most of this time, not to mention that the district court had ordered the parties not to file any motions, and later not to file any pleadings, thereby preventing plaintiff-appellant from amending or supplementing his first federal court complaint.)

Since there are several common questions

of law or fact plaintiff files a motion to consolidate. The court however without any explanation or comment at all decides that there are no common questions of law or fact and denies the motion to consolidate. The court instead dismisses plaintiff's PJM-97-379 and PJM-97-3359 and PJM-97-3495 federal court complaints, for although there are supposedly no common questions of law or fact, the court finds them to be duplicative of claims, whatever that means.

One of the problems with this totally incorrect analysis is that the court is totally ignoring the simple fact that it was the very limited time frames in which plaintiff had to file federal court complaints which resulted in the several federal court complaints in the first place, and which now prevents the district court, apart from the district court first employing the procedure of consolidation, from acting on plaintiff's federal court complaints all at once for the stated reasons.

So much for hypotheticals. Unfortunately, the preceding hypothetical is basically what really happened in the United States District Court for the District of Maryland in PJM-96-2913, PJM-97-379, PJM-97-3359, and PJM-97-3495.

So now what is really going on. Plaintiff posits that with plaintiff being a white male who is challenging so called affirmative action programs for minorities and

females, and with the district court judge having been appointed by President Clinton who is the biggest public supporter of so called affirmative action programs for minorities and females, the reality of the matter is that this court is obviously going to do everything it can to make sure that defendants do not lose and correspondingly that plaintiff does not win. Unfortunately, PJM-97-379 and PJM-97-3359 and PJM-97-3495 have really been "duplicative" but not "duplicative of claims", but "duplicative of declarations of entry of default by plaintiff against defendants" and "duplicative of motions for judgment by default by plaintiff against defendants". See Exhibit "23", which is a true and exact copy of an original and is a copy of three examples of Declarations for Entry of Default and Motions for Judgment by Default in PJM-97-379, PJM-97-3359, and PJM-97-3495, namely a declaration for entry of default in PJM-97-379, a motion for judgment by default in PJM-97-379, a declaration for entry of default in PJM-97-3359, a motion for judgment by default in PJM-97-3359, a declaration for entry of default in PJM-97-3495, and a motion for judgment by default in PJM-97-3495, which rather coincidentally are precisely the civil actions dismissed by the district court judge. It is so obvious that what the court is trying to do is simply dismiss PJM-97-379 and PJM-97-3359 and PJM-97-3495 just so that this court does not have to deal with the motions for

judgment by default by plaintiff against defendants. If there were really "duplicative claims" then why were not PJM-96-2913 and PJM-97-3483 dismissed instead? The answer is really very simple, in that these are not "duplicative of declarations of entry of default by plaintiff against defendants" and "duplicative of motions for judgment by default by plaintiff against defendants".

APPENDIX WW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*05/03/99
	*USCAF Docket #
FRANK PAUL LUKACS	*98-2383
	*98-2384
Plaintiff	*98-2386
	*
v.	*
	*
DONNA E. SHALALA, et al.	*
	*District #s
Defendants	*CA-97-0379-PJM
	*CA-97-3359-PJM
* * * * * * * * * * * * * * *	*CA-97-3495-PJM

PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

The misleading and **factually incorrect** appellate court opinion is in conflict with **every** decision of the Fourth Circuit as well as in conflict with **every** other decision of every other circuit regarding the requirement that **"there must have been a final judgment on the merits"** and that **"the prior action must have involved the same claim"** for the claim preclusion doctrine to apply, and is in conflict with every decision of every circuit whether using the **transactional approach** or

the **factual allegations approach** for claim preclusion. The misleading and **factually incorrect** appellate court opinion totally negates **42 USC § 2000e-16 (Title VII)** regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances which specifically states that "**Within 90 days of receipt of notice of final action** taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, **an employee or applicant for employment may file a civil action** as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." The misleading and **factually incorrect** appellate court opinion totally negates **29 C.F.R. § 1614** regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances which specifically states that **"A complainant who has filed an individual complaint is authorized under Title, the ADEA, and the Rehabilitation Act to file a civil action in an appropriate United States District Court within 90 days of receipt of a final decision on an individual**

complaint if no appeal has been filed or within 90 days of receipt of the Commission's final decision on an appeal". ...

"According to 42 U.S.C. § 2000e-16 (Title VII) and 29 C.F.R. § 1614 plaintiff had every right to file "civil actions in an appropriate United States District Court" "within 90 days of receipt of the final decision on an individual complaint" and "within 90 days of receipt of the Commission's final decision on an appeal" of a "separate EEO complaint"."

Even if one does a cursory review, whether by the same transactional approach or by the same factual allegations approach, one can readily see that the four dozen separate and distinct Equal Employment Opportunity (EEO) complaints themselves, which are the basis of the claims, and which were initially filed within 30 or later 45 days of a discriminatory event, as per 42 U.S.C. §2000e-16 and 29 C.F.R. § 1614 are all different in the five civil actions.

With this decision, the district court and the appellate court have now declared that appellant did not have to exhaust his administrative remedies before filing a civil action in federal court, and that he did not have to file a civil action within 90 days of receipt of notice of final action, such as appellant did. ...

STATEMENT OF FACTS AND REASONS REGARDING THE PETITIONS

"Modern courts, in applying the *Cromwell* definition of the claim preclusion doctrine, have stated that at least three elements must be present before a claim will be barred as a result of a judgment in a prior action:

(1) **there must have been a final judgment on the merits**

(2) the prior action must have involved the same parties or their privies

(3) **the prior action must have involved the same claim.**

18 Moore's Federal Practice 3D, § 131.01 (Matthew Bender 3d ed.) under section entitled "Fundamental Principles of Claim Preclusion (Res Judicata) Doctrine - Doctrine Bars Claims Which Were Subject of Prior Judgment".

In addition, only those "**matters that arise from the same facts, occurrences, or transactions that were the basis of a prior action** may be within the scope of claim preclusion by that action". 18 Moore's Federal Practice 3D, § 131.10 [3] [c] (Matthew Bender 3d ed.). In addition it is only applicable if there is **"liberal joinder and amendment, and broad discovery rights, [and the] parties [have] had sufficient opportunity to present all of their related claims and defenses in the same action"**. 18 Moore's

Federal Practice 3D, § 131.11 [3] (Matthew Bender 3d ed.). ...

Since here there has not been any final judgment on the merits, since the prior action did not involve the same claims, since the elements of the same transactional test are not met, and since the elements of the same factual allegations test are not met, there can be no claim preclusion or duplication of claims.

"**Claim preclusion does not require a plaintiff to bring *every* claim that the plaintiff may have against a particular defendant in one action.** Such a requirement might well work against the very policy concerns of judicial efficiency and fairness to the parties that are the basis of the doctrine. Rather, only those claims that fall within the criteria set forth in the various approaches to the scope of claim preclusion described above must be brought in the same action. In *Doe v. Allied Signal, Inc.*, the Court of Appeals for the Seventh Circuit provided an example of **multiple claims arising within the same general fact pattern that were appropriately the subject of separate actions**. ... Example of multiple claims arising within same fact pattern but litigated in separate actions. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914 (7th Cir. 1993) (**plaintiff is not obligated to bring all claims together if they**

do not arise from same transaction). ... Identifying multiple claims within a single chain of events requires careful review of the facts and theories comprising the claims, but courts regularly find such multiple claims to exist. ... Courts regularly find multiple claims to exist. *2d Circuit* see *NLRB v. Union Techs. Corp.*, 796 F.2d 1254, 1259-1260 (2d Cir. 1983) (action by union was not barred even though it involved same rule and same contract provision as prior action; the court stated **"[T]he circumstances that several operative facts may be common to successive actions between the same parties does not mean that the claim asserted in the second is the same claim that was litigated in the first, and that litigation of the second is therefore precluded by the judgment in the first."**). *11th Circuit* *Wu v. Thomas*, 863 F.2d 1543, 1548-1549 (11th Cir. 1989) (action for retaliation not barred by prior action for civil rights violation, even though prior action included some testimony regarding retaliation)." 18 Moore's Federal Practice 3D, § 131.22 [2] (Matthew Bender 3d ed.) under section entitled "Claims Existing at Time of Prior Action But Outside Scope of Claim Preclusion".

Thus appellant was not required to, and in fact could not procedurally, bring every claim in one action. His multiple claims were appropriately the subject of separate actions.

"Many of the most difficult questions concerning the scope of claim preclusion arise in the context of **continuing wrongful conduct**. ... Whatever the cut-off date, **a continuing series of wrongful acts resulting in ongoing damage to the plaintiff will usually permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine**. ... **Continuing series of wrongful acts will usually permit series of actions.** *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) (**each time plaintiff is injured by defendant, cause of action accrues**); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (series of torts will give rise to several causes of action); see *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), cert. denied, 459 U.S. 943 (1982) (continuing antitrust violations); *United Food & Commercial v. City Foods, Inc.*, 878 F. Supp. 122, 123 (N.D.Ill. 1995) (**"[A] defendant's continuing course of conduct, even if related to conduct complained of in the earlier lawsuit, generally creates a separate cause of action."**) 18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled "Continuing Wrongful Conduct by Defendant".

Most of the different, separate, and

distinct transactions and facts of appellant's four dozen different, separate, and distinct EEO complaints in his five civil actions can be characterized as "continuing wrongful conduct by defendant", or a "continuing series of wrongful acts permitting a series of actions", with each such action considered to be a separate claim unrestricted by the limitations of claim preclusion or duplication of claims. ...

"[T]rial courts (and appellate courts as well) may raise preclusion issues sua sponte. Of course, **the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. ... Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied.** Compare *McClain v. Apodaca*, 793 F.2d 1031, 1032-1033 (9th Cir. 1986) (**sua sponte application of preclusion appropriate when district court heard evidence and gave both parties opportunity to address issue before ruling**) with *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (**sua sponte application of preclusion not appropriate when court did not allow briefing on issue**)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

As the record amply demonstrates, appellant did not have reasonable notice and

opportunity to be heard *before* the application of claim preclusion by the court, and in fact appellant did not have any notice at all or any opportunity at all to be heard *before* the application of claim preclusion by the court. Thus although the relevant cases state that "Parties must have reasonable notice and opportunity to be heard *before* claim preclusion is applied", here the district court was in a hurry to apply claim preclusion in a totally meaningless manner, totally ignoring all the relevant case law, especially since defendants were losing, and considering defendants supposed representatives the Department of Justice too incompetent to bring up, or meet the burden of proof on, claim preclusion or duplication of claims on their own. Then again the district court judge has been acting more like the real representative for defendants anyway, replacing the supposed representatives for defendants the Department of Justice, of whose professional legal competence the district court judge must have an even lower opinion than that of appellant.

...

"Even if all of the other prerequisites for claim preclusion are met, it will not be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the

prior proceeding. Party against whom claim preclusion is asserted must have had full and fair opportunity to litigate claim in prior proceeding. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 & n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262, reh'g denied, 458 U.S. 1133 (1982) (**although prior holdings regarding requirement of full and fair opportunity to litigate were in context of issue preclusion, invocation of claim preclusion is subject to same requirement**). *7th Circuit Pirella v. Village of N. Aurora*, 935 F.2d 909, 913 (7th Cir.), cert. denied, 502 U.S. 983 (1991) (**"It is a well-established principle that no decision may constitute res judicata if the party against whom it is asserted has not had a full and fair opportunity to litigate his claims."**) *9th Circuit California v. FCC*, 905 F.2d 1217, 1245 (9th Cir. 1990) (**claim preclusion no bar to subsequent action when party was not given full and fair opportunity to litigate claim in prior proceeding**). *11th Circuit Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985) (**"It is well settled that res judicata cannot be applied against a party who did not have a full and fair opportunity to litigate an issue in a previous suit."**). 18 Moore's Federal Practice, § 131.41 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Parties To Be Bound Must Have Had Full and Fair Opportunity**

to Litigate Prior Claim".

Here appellant never had any, much less a "full and fair, opportunity to litigate" any of the claims or any of the issues. Appellant was not even permitted to "amend the party's pleadings once as a matter of course at any time before a responsive pleading is served", with the district court judge ordering the clerk of the court that appellant's amended complaints not even be docketed and ordering that they instead be physically returned to appellant. ...

A simple broad claim by claim comparison for "Federal Sector Equal Employment Opportunity" (to use the words of 29 C.F.R. § 1614) civil actions is inappropriate, for the claims themselves are based upon the "transactions" or "factual allegations" of the complaint, which however because of 29 C.F.R. § 1614 is limited in that for each transaction or factual allegation or "matter alleged to be discriminatory", to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a different, separate, and distinct Equal Employment Opportunity (EEO) complaint "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action", and thus in effect each different, separate, and distinct

EEO complaint within 45 days of the date of the matter alleged to be discriminatory is a different, separate, and distinct transaction and a different, separate, and distinct factual allegation for purposes of claim analysis.

In addition, since the pleadings of PJM-96-2913 and PJM-97-3483 only addressed about a dozen and a half different, separate, and distinct timely filed EEO complaints and therefore addressed only the "matters alleged to be discriminatory" or only the "transactions" or only the "factual allegations" in those different, separate, and distinct EEO complaints, the pleadings of PJM-97-379, PJM-97-3359, and PJM-97-3495 addressing an additional three dozen different, separate, and distinct timely filed EEO complaints containing different, separate, and distinct "claims" and different, separate, and distinct "matters alleged to be discriminatory" and different, separate, and distinct "transactions" and different, separate, and distinct "factual allegations", and which "could not have been raised in the prior litigation" and on which plaintiff-appellant did not have a "full and fair opportunity to litigate the claim in the prior proceeding" to boot, cannot be used for purposes of claim preclusion or issue preclusion or even duplication of claims.

APPENDIX XX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*05/03/99
	*USCAF Docket #
FRANK PAUL LUKACS	*98-2383
	*98-2384
Plaintiff	*98-2386
	*
v.	*
	*
DONNA E. SHALALA, et al.	*
	*District #s
Defendants	*CA-97-0379-PJM
	*CA-97-3359-PJM
* * * * * * * * * * * * * * *	*CA-97-3495-PJM

ATTACHMENT TO PLAINTIFF-APPELLANT'S
PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

... It is rather apparent from the rather short opinion itself that **the Appellate Court**, in its very decision trying to justify its judgment, by its very silence on the topic, and even with more legal knowledge and expertise and capability at doing computer legal database searches, apparently **could not find even one appellate court decision, could not find even one district court case, either in the Fourth Circuit, or in any other circuit**

for that matter, in support of its completely erroneous decision. Not only that, every other decision from every other court regarding the matter has come to a totally different conclusion. ...

"For example, if anyone had actually even briefly compared even the broad titles of the claims themselves, without even actually comparing the underlying **transactions** or **factual allegations** of the claims themselves, they would have readily seen that PJM-96-2913 and PJM-97-3483 did not contain any claims for retaliatory constructive discharge or harassment or intentional infliction of emotional distress and physical injury. The dismissed civil action PJM-97-379 contained a motion for an amended complaint ("once as a matter of course at any time before a responsive pleading is served") containing claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury, and the dismissed civil action PJM-97-3495 contained claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury. Thus what really happened is that the district court dismissed the two civil actions containing the claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury and retained the two civil

actions which did not contain these claims. Then to boot, when appellant attempted to amend the pleadings according to FRCP Rule 15 (a) **"once as a matter of course at any time before a responsive pleading is served"** in PJM-96-2913 and PJM-97-3483 with claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury, the district court judge ordered that the clerk of the district court not even docket these properly and appropriately filed amended complaints, and that these amended complaints be physically returned to appellant for the district court had no intention whatsoever of ever considering them. Then to add further insult to injury, when appellant attempted to file this exact same amended complaint as a separate civil action, the district court applied claim preclusion to these same claims which it simply refused to initially even permit in any amended complaint." ...

Even if one does a cursory review, whether by the same transactional approach or by the same factual allegations approach, one can readily see that the four dozen separate and district Equal employment Opportunity (EEO) complaints themselves, which are the basis of the claims, and which were initially filed within 30 or later 45 days of a discriminatory event, as per 42 U.S.C. §2000e-

16 and 29 C.F.R. § 1614 are different in the five civil actions.

As appellant has previously stated:

"For example civil action PJM-96-2913, which included about a half a dozen different separate and distinct EEO complaints, contained appellant's seventh and tenth EEO complaints timely filed on 10/15/91 and 01/27/92 respectively concerning job vacancy announcements for contract specialist positions CA-91-0159 and OD-91-0162 and designated by NIH as EEO # OEO-015-92 and EEO # OEO-077-92, as well as appellant's thirty first and thirty eighth EEO complaints timely filed on 05/08/94 and 11/26/94 concerning job vacancy announcements for the management cadre program positions and was designated by NIH as EEO # OEO-122-94 and EEO # OEO-030-95.

For example civil action PJM-97-379, which included about a dozen different separate and distinct EEO complaints, contained appellant's forty ninth and fifth sixth EEO complaints timely filed on 06/02/95 and 09/03/95 respectively concerning the job vacancy announcements for the National Cancer Institute (NCI) Administrative Career Development (ACD) program and was designated by NIH as EEO # OEO-135-95 and EEO # OEO-192-95.

For example civil action PJM-97-3359, which included about a dozen different separate and distinct EEO complaints, contained appellant's first and second EEO

complaints timely filed on 01/16/91 and 04/22/91 respectively concerning the job vacancy announcements for contract specialist positions OD-90-0395 and CA-91-0014 and designated by NIH as EEO # OEO-62-91 and EEO # OEO-155-91, and also contained appellant's fourth and fifth and eighth EEO complaints timely filed on 05/06/91 and 07/10/91 and 12/30/91 respectively concerning the job vacancy announcements for contract specialist positions OD-91-0063 and DK-91-0490 and was designated by NIH as EEO # OEO-153-91, EEO # OEO-156-91, and EEO # OEO-073-92.

For example civil action PJM-97-3495, which included about a dozen different separate and distinct EEO complaints, contained appellant's fifty seventh EEO complaint timely filed on 09/04/95 concerning the job vacancy announcements for the NIH Office of Technology Transfer's (OTT) technology licensing specialist positions and was designated by NIH as EEO # OEO-193-95."

...

"As a matter of practicality, the facts of a half dozen of appellant's EEO complaints in PJM-96-2913 and the facts of a dozen of appellant's EEO complaints in PJM-97-3483 could not possibly have been the same as the facts of a completely different three dozen of appellant's EEO complaints in PJM-97-379, PJM-97-3359, and PJM-97-3495, with all of them being timely filed in different time periods

over the course of several years within [initially 30 and later] "45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action" as per the relevant controlling 29 C.F.R. § 1614.

Furthermore, the Fourth Circuit follows either the "same transactional approach to the identity of claims question" in that it has to be the same "transaction, or series of connected transactions, out of which the action arose", or the "same factual allegations approach to the identity of claims question". Such is not the case here. Here the facts themselves are separated in time and space, for they have had to be of necessity, for according to the relevant rules and regulations of 42 USC § 2000e-16 and 29 C.F.R. § 1614, a different, separate, and distinct EEO complaint has be filed within 45 days of an event, and plaintiff can only go to federal court on different, separate, and distinct EEO complaints, and plaintiff cannot just go to federal court on so called broad claims or issues that are not contained within the transactions and fact situations occurring within 45 days immediately preceding the filing of the different, separate, and distinct EEO complaints. Thus the transactions and factual allegations themselves cannot possibly be the same for

different, separate, and distinct EEO complaints, and thus the claims cannot possibly be the same ones for they are based on different, separate, and distinct transactions and factual allegations. Plaintiff's civil pleadings PJM-96-2913 and PJM-97-3483 only contained the facts of about a dozen and a half different,separate, and distinct EEO complaints, and plaintiff's civil pleadings PJM-97-379, PJM-97-3359, and PJM-3495 contained the facts of each of about three dozen completely different, separate, and distinct EEO complaints." ...

"Since there were several common questions of law or fact plaintiff filed motions to consolidate in each of his federal court complaints. The court however without any explanation or comment at all decided that there were no common questions of law or fact and denied the motions to consolidate. The court instead dismissed plaintiff's PJM-97-379 and PJM-97-3359 and PJM-97-3495 federal court complaints, for although there were supposedly no common questions of law or fact, the court found them to be duplicative of claims, whatever that means."

"If there is anything such as "duplication of claims", whatever that means, then by definition, there must be "common questions of law or fact pending before the court", and if the court first determines that

there are no "common questions of law or fact pending before the court", then the court cannot later conclude that nevertheless there are "duplication of claims". This reasoning and logic is totally non sequitur. Either there are "common questions of law or fact pending before the court", or else there are not. The court cannot have it both ways." ...

"If PJM-97-379 and PJM-97-3359 and PJM-97-3495 have really been "duplicative", it is not "duplicative of claims", but **"duplicative of declarations of entry of default by plaintiff against defendants"** and **"duplicative of motions for judgment by default by plaintiff against defendants"**. See Exhibit "23", which is a true and exact copy of an original and is a copy of three examples of Declarations for Entry of Default and Motions for Judgment by Default in PJM-97-379, PJM-97-3359, and PJM-97-3495, namely a declaration for entry of default in PJM-97-379, a motion for judgment by default in PJM-97-379, a declaration for entry of default in PJM-97-3359, a motion for judgment by default in PJM-97-3359, a declaration for entry of default in PJM-97-3495, and a motion for judgment by default in PJM-97-3495, which rather coincidentally are precisely the civil actions dismissed by the district court judge. It is so obvious that what the court is trying to do is simply dismiss PJM-97-379 and PJM-97-3359

and PJM-97-3495 just so that this court does not have to deal with the motions for judgment by default by plaintiff against defendants. If there were really "duplicative claims" then why were not PJM-96-2913 and PJM-97-3483 dismissed instead? The answer is really very simple, in that PJM-96-2913 and PJM-97-3483 were not, unlike PJM-97-379 and PJM-97-3359 and PJM-97-3495, **"duplicative of declarations of entry of default by plaintiff against defendants"** and **"duplicative of motions for judgment by default by plaintiff against defendants"**."

APPENDIX YY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*02\18\99
FRANK PAUL LUKACS	*USCAFC Docket #
Plaintiff	*99-1108
v.	*
DONNA E. SHALALA, et al.	*D. of Maryland #
Defendants	*CA-96-2913-PJM
* * * * * * * * * * * * * * *	

PLAINTIFF-APPELLANT'S INFORMAL BRIEF
PURSUANT TO LOCAL RULE 34(B)

... "The injury plaintiff suffered was the denial of a statutory and constitutional right to be free of discriminatory treatment in the process of selection for employment or benefits.

Defendants have treated plaintiff differently on the basis of his race, sex, and national origin. Defendants treated plaintiff less favorably than others because he is an old white male of Hungarian ancestry.

Plaintiff is a member of a protected group, since plaintiff is a white male. Plaintiff has applied for numerous job vacancy announcements and benefits. Plaintiff was qualified for these numerous job vacancy announcements and benefits. Plaintiff was rejected for these numerous job vacancy

announcements and benefits. These positions or benefits either remained open and the employer continued to seek applicants, or else the positions or benefits were given to members outside of the protected group of white males. Plaintiff was rejected for the position under circumstances giving rise to an inference of unlawful discrimination especially all of the circumstances and countless elements of so called affirmative action, FEORP, and AEP.

Defendants have not articulated any, much less any legitimate, nondiscriminatory reason for most of the employment actions or denial of benefits. In those few cases where Defendants have articulated reasons for the employment actions or denial of benefits, defendants' reason was a mere pretext for discrimination or simply not credible." ...

"Petitioner from the date of his first Equal Employment Opportunity ("EEO") complaint at the National Institutes of Health ("NIH") in January of 1991, despite his having applied on an average of about once every month for advertised job vacancy announcements, and having timely filed over sixty separate and distinct EEO complaints "within 45 days of the date of the matter alleged to be discriminatory" as per 29 C.F.R. § 1614, on about fifty of which EEO complaints there was never any of the 29 C.F.R. § 1614 mandatory

processing and investigation by the agency, has never once in all this time ever been selected for a so called affirmative action designated or Federal Equal Opportunity Recruitment Program ("FEORP") designated or Affirmative Employment Program ("AEP") designated opening, which are in effect set aside for minorities and women and hispanics, at the NIH, at DHHS, or anywhere else in the entire United States federal government.

Petitioner maintains that because he is a caucasian male, and is over forty years of age and is a first generation legal immigrant of Hungarian ancestry, his career in the federal government has been limited to a few job series which are non-FEORP designated and non-AEP designated positions and that he has been forced to follow a career path that is outside of the "mainstream occupations", or highly populous occupations which tend to lead to higher level positions in the agency." ...

ISSUE PRESENTED

Did the filing of a timely notice of appeal immediately transfer jurisdiction to the circuit court and divest the district court of jurisdiction? ...

ISSUE PRESENTED

Absent extraordinary circumstances, such as a demonstrated history of frivolous and

vexatious litigation, or a failure to comply with sanctions imposed for such conduct, does a district court have the power to prevent a party from filing or having docketed pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure, or dismissing and refusing to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP? ...

ISSUE PRESENTED

Should the appellate court remand with instructions to the district court to consolidate Appellant's five federal court cases, PJM-96-2913, PJM-97-379, PJM-97-3495, PJM-97-3483, and PJM-97-3495 according to Federal Rules of Civil Procedure Rule 42 Consolidation since these five federal court cases are **"actions involving a common question of law or fact pending before the same court"**? ...

""A common factual issue, such as two lawsuits pending in the same court and brought by the same plaintiff, is a sufficient basis for consolidation if combining the two cases will simplify the litigation process. Especially if the alternative (to dismiss the second lawsuit and require the plaintiff to amend its first complaint to add the dismissed allegations) would be a complicated exercise

of form over substance, consolidation is generally preferred. *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (court found consolidation of two cases filed by same plaintiff "enhanced efficiency and economy for all concerned")." 8 Moore's Federal Practice, § 42.10 [1] [c] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Multiple Filings by One Plaintiff May be Consolidated"."

"Here the district court has gone even one step further, for contrary to the clear holding of the above case, the district court sua sponte has dismissed the second lawsuit, and the third lawsuit, and the fifth lawsuit, and rather than "require the plaintiff to amend its first complaint to add the dismissed allegations", this district court has simply "denied plaintiff even the opportunity to amend the first complaint to add the dismissed allegations"."

"If the court should have done anything sua sponte, it should have consolidated the lawsuits pending in the same court sua sponte, rather than refusing to even consider the motion to consolidate, and dismissing pending cases on a mere pretext."

""Consolidation of separate actions presenting a common issue of law or fact is permitted under Rule 42 as a matter of convenience and economy in judicial

administration. ... Although the public employee's initial employment discrimination action under Section 2000 e et seq. of Title 42 and his subsequent action alleging removal from employment for constitutionally impermissible reasons arose out of the same set of facts and sought basically the same relief, the district court erred in dismissing the second action on the ground that the earlier suit arose from the same set of facts. The proper solution would have been to consolidate the two separate actions in the interests of equity and judicial economy. *Miller v. U.S. Postal Serv.*, C.A.5th, 1984, 729 F.2d 1033." 9 Wright & Miller, Federal Practice and Procedure: Civil 2d § 2383 (1995), text plus footnote 1 case.

"The pendency of an earlier action in the same federal district court was not a ground for dismissal of a subsequently instituted action that was alleged to be based on a cause of action identical to that in the pending action against the same defendants, and the proper solution would be to consolidate those actions. *Thomas v. Deason*, D.C.Ky. 1970, 317 F.Supp. 1098, 1099." 9 Wright & Miller, Federal Practice and Procedure: Civil 2d § 2383 (1995), footnote 1 case."

""The broad managerial power of the district court to consolidate extends to the consolidation of cases where no motion has

been brought. A trial court has the power sua sponte to hold a hearing to determine whether the actions then pending before it should be consolidated. *Katz v. Realty Equities Corp. of N. Y.*, 521 F.2d 1354, 1356 (2d Cir. 1975) (court held hearing to determine consolidation). *Miller v. United States Postal Service*, 729 F.2d 1033, 1036-1037 (5th Cir. 1984) (appellate court remanded cause with instructions to district court to consolidate two cases for trial.) No motion was pending." 8 *Moore's Federal Practice*, § 42.10 [2] [b] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Broad Discretion Extends to Power to Consolidate Sua Sponte"."

ISSUE PRESENTED

Did Plaintiff-Appellant have a right to amend his pleading once as a matter of course at any time before a responsive pleading is served according to the "**Federal Rules of Civil Procedure Rule 15 which states that "(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served**"?

"**Federal Rules of Civil Procedure Rule 15 states that**

"**(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is**

served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires**. A party shall plead in response to an amended pleading within the time remaining for service to the original pleading or within 10 days after service of the amended pleading, wherever period may be longer, unless the court orders otherwise."

Defendants to date have not submitted a "responsive pleading".

Plaintiff amended the pleading "once as a matter of course at any time before a responsive pleading is served" as per Federal Rules of Civil Procedure Rule 15 (a) Amendments. ...

"The rule allows for liberal amendments in the interests of resolving cases on the merits." 3 Moore's Federal Practice, § 15.02 [1] (Matthew Bender 3d ed.). The court's discretion to dismiss claim without leave to amend is limited by direction of Rules to amend where justice requires, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). The pleadings are not a game of skill in which "one misstep by counsel may be decisive to the outcome", *Conley v. Gibson*, 355 U.S. 41, 48,

78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

"A party is allowed to amend a pleading once "as a matter of course" or without leave of court", 3 Moore's Federal Practice, § 15.10 (Matthew Bender 3d ed.). **Since defendants had not filed a responsive pleading, plaintiff had a right to amend on remand**, *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344, 353-354 (7th Cir. 1992). **The court improperly denied leave when plaintiff was under no obligation to ask for leave because defendant had not filed responsive pleading**, *Stewart v. RCA Corp.*, 790 F.2d 624, 631 (7th Cir. 1986). **Order denying amendment was improper when plaintiff may amend once without leave, and it is irrelevant that leave was not requested**, Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

"A party may amend a pleading as a matter of course at any time before a responsive pleading is filed. ... the filing of a Rule 12(b) defense extends the time for filing an answer". 3 Moore's Federal Practice, § 15.11 (Matthew Bender 3d ed.). **Motion to dismiss is not a responsive pleading so the right to amend was not cut off and the district court was obligated to review the amended complaint**, *Hill v. City of Indianapolis*, 17 F.3d 1016, 1018 (7th Cir. 1994). **The court improperly denied leave because the plaintiff had a right to amend the complaint since no responsive pleading had been filed**, *Fortner v. Thomas*,

983 F.2d 1024, 1032 (11th Cir. 1993).

"The term responsive pleading is defined by reference to Rule 7(a), which distinguishes between pleadings and motions, and provides an exclusive list of what is a pleading: a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint, and an answer. Pre-trial motions attacking the pleadings or seeking relief as to collateral matters are not responsive pleadings. Accordingly if no responsive pleading has been filed, the filing of these motions does not cut off a plaintiff's right to amend as a matter of course. Examples of pre-trial motions include: motions to dismiss, motions for summary judgment, motions for a more definitive statement under Rule 12, motions for production and inspection, and motions to quash service." 3 Moore's Federal Practice, § 15.11 (Matthew Bender 3d ed.). The court allowed the amendment and specified the types of pre-trial motions that did not constitute responsive pleadings, *Kroger Co. v. Adkins Transfer Co.*, 284 F.Supp. 371, 374 (D.C. Tenn. 1968). **A motion to dismiss and compel arbitration was not a responsive pleading**, *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659 (11th Cir. 1987). **A motion to dismiss is not a responsive pleading and order dismissing complaint does not cut off the right to amend**, *Camp v. Gregory*, 67 F.3d

1286, 1289 (7th Cir. 1995). **At the time of dismissal, defendant had not yet filed a responsive pleading, so plaintiff had a right to amend once as a matter of course**, *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344, 353-354 (7th Cir. 1992). **A motion to dismiss is not a responsive pleading**, *Miles v. Dep't of Army*, 881 F.2d 777, 781 (9th Cir. 1989). **When defendants only filed a motion to dismiss, plaintiff was entitled to amend as of right because it is well established in circuit that motion is not responsive pleading**, *Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993). **Neither motions for summary judgment nor dismissal are responsive pleadings**, *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984). **Court should have granted proposed amendment because no responsive pleading was filed**, *Ross v. Franzen*, 777 F.2d 1216, 1222 (7th Cir. 1985)."

"**One amendment is permitted of course before a responsive pleading is filed.** *Coral v. Gonse*, 330 F.2d 997 (4th Cir. 1964); *Wallace v. Chrysler Credit Corp.*, 743 F.Supp. 1228 (W.D. Va. 1990)." "**Motions to dismiss and for summary judgment are not considered responsive pleadings for purposes of subdivision (a) of this rule.** *Williams v. Wilkerson*, 90 F.R.D. 168 (E.D. Va. 1981)." "**Motions to dismiss and motions for summary judgment are not treated as responsive**

pleadings under this rule. *United States ex rel. Tucker v. Thomas Howell Kiewit (USA) Inc.*, 149 F.R.D. 125 (E.D. Va. 1993)." "**Where defendants did not file an answer to plaintiff's original complaint, but rather filed motions to dismiss, such pre-answer Rule 12(b) motions not being responsive pleadings, plaintiff was not required to obtain leave of court before filing his amended complaint.** *Sohns v. Dahl*, 392 F.Supp. 1208 (W.D. Va. 1975)."

ISSUE PRESENTED

Should the district court have granted the motion for leave to file an amended complaint and considered plaintiff appellant's amended complaint, which was submitted according to the specific directions of the district court in the order dated August 19, 1998 and mailed September 02, 1998 which stated that "A "Motion for Leave to File an Amended Complaint is required", according to the **Federal Rules of Civil Procedure Rule 15** which specifically states that **"(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served" "a party may amend the party's pleading by leave of court ... and leave shall be freely given when justice so requires"**, especially since no responsive pleading had been filed.

"Although the ability to amend a pleading is not automatic and requires court approval, a district judge should freely grant leave to amend when justice requires, absent a substantial reason to deny. **A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a).**" 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.).

"The text of Rule 15(a) is unequivocal regarding the requirement that leave to amend be liberally granted. The policy that a court should freely grant amendments limits a court's ability to deny leave to amend, and in a proper case, may warrant a finding of abuse of discretion in denying leave. During the pretrial phase, a court should allow amendments to ensure that all the issues are before the court." 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.). The court's discretion to deny leave is limited by the procedural rule promoting amendment, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

"Under Foman v. Davis it is an abuse of discretion if the district court refuses to grant leave to amend without giving any reason." 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.). Courts should freely grant leave to amend, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). **If court lacks substantial reason**

to deny leave, discretion is not broad enough to permit denial, *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1303 (5th Cir. 1995).

"The leading case regarding the trial court's exercise of discretion to deny amendment is *Foman v. Davis*. In *Foman*, the Supreme Court asserted that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." After the *Foman* decision, it is clear that a trial court must provide a reason for denying a motion to amend. The *Foman* decision also clarified the factors that a district judge may use to deny leave to amend. These factors include: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment." 3 Moore's Federal Practice, § 15.15 [1] (Matthew Bender 3d ed.).

Defendants have not even bothered bringing up any of these factors, probably because they simply do not exist, as there has been no undue delay, no bad faith or dilatory motive on the part of the movant, no repeated failure to cure deficiencies by amendments previously allowed, no undue prejudice to the opposing party, and no futility of the amendment.

Allegations of pro se litigants are held to a less stringent standard than pleadings drafted by lawyers, *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Court should provide opportunity to amend before dismissal for pro se plaintiff to develop case sufficiently to bring to light any merits of case, *Parker v. Fort Worth Police Dep't.*, 980 F.2d 1023, 1026 (5th Cir. 1993). **Before court may dismiss pro se litigant for failure to state claim, it must provide notice of deficiencies and opportunity to amend before dismissal**, *McGluckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992).

"In determining whether to grant leave to amend, a court should consider whether any facts are alleged that are sufficient to support a claim. **The appellate court will review the facts de novo to determine if dismissal without leave to amend is proper.**" 3 Moore's Federal Practice, § 15.15 [3] (Matthew Bender 3d ed.)."

"**This rule provides liberal practice in allowance of amendments to formal pleadings.** *Coral v. Gonse*, 330 F.2d 997 (4th Cir. 1964). **In federal practice leave to amend is to be granted with liberality.** *Austin v. Reynolds Metals Co.*, 327 F.Supp. 1145 (E.D. Va. 1971)." "**Motion to dismiss held in abeyance so plaintiff could tender amended complaint.** *Miller v. Holiday Inns, Inc.*, 436 F.Supp. 460

(E.D. Va. 1977)."

""Because the volume and nature of claims pleaded can affect summary judgment, a party seeking to avoid summary judgment may profit from amending its complaint to allege additional or different matter." 11 Moore's Federal Practice, § 56.30 [8] [a] [iii] (Matthew Bender 3d ed. 1997) under section entitled "[a] Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions [iii] Motions to Amend Pleadings May Narrow or Broaden Factual and Legal Questions and Can Therefore Affect Summary Judgment".

Petitioner's original unverified pleading only recited the facts of a half a dozen of petitioner's separate and distinct individual equal employment opportunity complaints. Petitioner's proposed amended verified complaint recites the facts of about four dozen of petitioner's separate and distinct individual equal employment opportunity complaints, and contains additional claims, including rather reluctantly a claim for a be fired or quit constructive discharge. However, if a Court simply refuses to even allow petitioner to file or to have docketed or to consider an amended complaint under an order which specifically threatens petitioner

with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means of the pleadings determining the relevance and materiality in litigation, for the contents of the pleadings to influence summary judgment decisions, and for the amended pleadings to broaden the factual and legal questions which can affect summary judgment, which may be the real intent behind the order in the first place.

[Verified pleadings] "may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (verified complaint treated as equivalent of an affidavit on a motion for summary judgment; conclusory allegations would be ignored on summary judgment, but factual averments could be considered; complaint could be considered to the extent that it complied with the standards of Rule 56(e).) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] "Piercing the Pleadings; Effect of Verified and Unverified Pleadings".

A verified complaint based on personal knowledge serves as the equivalent of an opposing affidavit for purposes of summary judgment. *Boyce v. Fleet Fin., Inc.*, 802 F.Supp 1404 (E.D. Va. 1992). A verified

complaint based on personal knowledge serves as the equivalent of an opposing affidavit for the purposes of summary judgment. *Jackson Hewitt, Inc. v. Greene*, 865 F.Supp. 1199 (E.D. Va. 1994).

However, if a Court simply refuses to even allow petitioner to file or have docketed a verified complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means for an "equivalent to a supporting or opposing affidavit", which may be the real intent behind the order in the first place.

"The party adverse to the motion [for summary judgment] has a more extensive period for filing affidavits, viz., "prior to the day of hearing [it] may serve opposing affidavits". ... The rules are structured to provide the nonmovant party with substantially more time for filing affidavits than moving parties. ... "The adverse party prior to the day of hearing may serve opposing affidavits." Fed.R.Civ.P. 56(c). We note that at least five circuits have held that the rule's reference to a "hearing" does not necessarily imply oral argument; a matter can be heard simply on the papers. The Third, Fourth, Seventh, Eighth, and District of Columbia Circuits have held that oral argument may be dispensed with in appropriate circumstances." *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 409-411 (1st Cir. 1985).

This interpretation of FRCP Rule 56(c) regarding a "hearing" itself represents a conflict among the circuits, and Petitioner believes that a "hearing" is a "hearing", something which can be heard, for a written "hearing" is itself non sequitur, and which therefore should be an oral "hearing" according to FRCP Rule 56 (c), which contemplated oral hearing according to FRCP Rule 56 (c) there has not been to date .

"If a party seeking summary judgment desires to use supporting affidavits, they should be served with the motion. And Rule 56(c) states that "[t]he adverse party prior to the day of hearing may serve opposing affidavits". This should be read in conjunction with Rule 6(d) which vests in the court the power to permit opposing affidavits "to be served at some other time"." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 620, §56.3 [8] "Notice; Time for Serving Affidavits".

However, if a Court simply refuses to even allow petitioner to file or have docketed a motion for leave to permit opposing affidavits under Rule 6(d) "to be served at some other time" under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means to "serve opposing affidavits", which may be the real intent behind the order in the first

place."

ISSUE PRESENTED

Will the Court of Appeals condone and in effect commend a federal agency totally ignoring the Code of Federal Regulations, especially 29 C.F.R. §1614.108 (a) Investigation of Complaints which specifically states that: "(a) **The investigation of complaints shall be conducted by the agency against which the complaint has been filed**", 29 C.F.R. § 1614.108 (b) which continues with "(b) In accordance with instructions contained in Commission Management Directives, **the agency shall develop a complete and impartial factual record** upon which to make findings on the matters raised by the written complaint", 29 C.F.R. § 1614.108 (b) which continues with "Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact finding conferences or any other fact finding methods that efficiently and thoroughly address the matters at issue", 29 C.F.R. § 1614.108 (d) which continues with the all important rule which has been consistently violated by defendants in that "(e) **The agency shall complete its investigation within 180 days** of the date of filing of an individual complaint", and 29 C.F.R. §1614.108 (f) which specifically state that "**within 180 days from the filing of the complaint, ... the agency**

shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to section 1614.110 from the agency with which the complaint was filed", especially when the federal agency intentionally and purposefully violates federal statute 29 C.F.R. §1614.108, sections (a), (b), (c), (d), (e), and (f) on about fifty of plaintiff-appellant's EEO complaints, (for in fact to date, almost seven years later, which is almost fourteen times the mandatory 180 day federal deadline for completing investigations, an investigation by the National Institutes of Health and the Department of Health and Human Services has not even begun much less been completed with respect to about fifty of plaintiff-appellant's formal Equal Employment Opportunity complaints), since plaintiff-appellant's EEO complaints being from a white male challenging the legality and constitutionality of so called affirmative action for minorities and females and hispanics were purposefully being delayed or simply intentionally not being independently processed or investigated for years and years and years and years and years and years and

years precisely because they were EEO complaints from a white male complaining about so called affirmative action programs, while at the same time other EEO complaints during those same seven years were being actively and aggressively processed and actively and aggressively investigated simply because these EEO complaints were from minorities or females or hispanics, with the agency knowingly, intentionally, and purposefully not even beginning any of the mandatory independent investigations on about fifty of plaintiff-appellant's EEO complaints simply because he is a white male complaining about being harmed and injured by so called affirmative action programs for minorities and females and hispanics, with the minorities and females and hispanics delegated the responsibility for initiating and maintaining such so called affirmative action programs for minorities and females and hispanics being also the same persons specifically delegated the responsibility for processing plaintiff's EEO complaints against so called affirmative action programs, and being also the same persons specifically delegated the responsibility for ordering that the mandatory independent investigations of such EEO complaints should begin, not to mention actually be completed, within the required statutory period of 180 days, or will the Appellate Court order that the federal agency comply with Code of Federal Regulations,

especially 29 C.F.R. § 1614.108, or will the Appellate Court actually impose the mandated sanctions of 29 C.F.R. § 1614 upon the agency for their purposeful and discriminatory violation of 29 C.F.R. § 1614?

"Basically, among other things, Plaintiff claims that as a federal government employee that Plaintiff had a right to have 29 C.F.R. § 1614, which became effective on October 1, 1992, followed as an element of Plaintiff's "compensation, terms, conditions, or privileges of employment", without discrimination.

42 U.S.C. § 2000e-2. Unlawful Employment Practices provides **"(a) it shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.""**

"*Young v. Sullivan* stated that:

"This is a title VII action in which plaintiff, pro se, Dr. Lih Y. Young, alleges that her former employer, the Department of Health and Human Services, discriminated against her on the basis of race and national origin and engaged in retaliatory conduct for plaintiff's earlier filing of an EEO complaint. Plaintiff further alleges that both the Department and the Equal Employment Opportunity Commission improperly processed and investigated her administrative claims for relief. Plaintiff requests this Court to order the agencies to fully investigate her administrative complaint, or in the alternative, for de novo review of her discrimination / retaliation allegations. At bar are defendants Louis Sullivan ("Sullivan") and Clarence Thomas's ("Thomas") motions to dismiss the complaint as failing to state a cause of action as a matter of law.

Defendant Thomas's motion to dismiss is granted in its entirety. **Title VII provides a former employee with a remedy only against his or her employer [FN1]. [FN1. Plaintiff does not allege that she was employed by the EEOC.] See 42 U.S.C. SS 20003-2, 2000e-5(f)(1).** It does not create an independent cause of action against the EEOC for its investigation and processing of a charge. (Citations omitted). Accordingly, plaintiff's action is dismissed as to defendant Thomas.

Defendant Sullivan's motion to dismiss is

granted in part and denied in part. **Title VII creates only a cause of action for discrimination.** It does not create an independent cause of action for the mishandling of an employee's discrimination complaints. [FN2] [FN2 **In some cases, however, a Title VII plaintiff may point to improper processing of claims as evidence of an employer's discriminatory motive.**]

Title VII must be viewed as a comprehensive statutory scheme designed to eradicate employment discrimination. The only "right" it establishes is the right to be free of discrimination. This interest is wholly preserved, even if the EEOC errs in its processing of the charge, by the right to a trial de novo ... *Hall v. Equal Employment Opportunity Commission*, 456 F.Supp. 695, 700 (N.D.Cal. 1978). Accordingly, Counts I, V, and VIII are dismissed. **Counts II, III, IV, and VII which allege claims of discrimination and retaliation remain**. It also appears from defendant Sullivan's motion to dismiss that there may be other legal issues which dispose of or narrow the issues in this case (i.e. whether plaintiff's claims are barred by res judicata, whether plaintiff's lawsuit was timely filed)." *Young v. Sullivan*, 733 F.Supp. 131 (D.D.C. 1990)."

Because of Plaintiff's different fact situation, especially since 1992 it is

Plaintiff's employer agency, namely DHHS and NIH, rather than the EEOC as in the 1990 case of *Young v. Sullivan*, which was also the agency with the responsibility to process and investigate Plaintiff's EEO complaints, and that "Title VII provides a former employee with a remedy against his or her employer", and since Plaintiff is also complaining that the total lack of processing and investigation is "evidence of an employer's discriminatory motive" and evidence of "employment discrimination" and that Plaintiff had a ""right" to be free of such discrimination", rather than merely complaining of the "mishandling of an employee's discrimination complaints", and that Defendants' intentional and purposeful failure to process and independently investigate Plaintiff's EEO complaints according to 29 C.F.R. § 1614 because he is a white male complaining about the discriminatory affirmative action programs for minorities and females and hispanics is the very "employment discrimination" of which Plaintiff is complaining, *Young v. Sullivan* is itself entirely consistent with Plaintiff's position.

"Here there is not only a total failure not only to not just timely process an EEO complaint, but in fact a total failure to process several EEO complaints at all, and in addition there is a total failure to conduct

several mandatory independent investigations for several years. Thus this case is distinguishable, for this is not just untimely processing, but a total lack of any processing at all, for in effect five years, **simply because these were EEO complaints by a white male against affirmative action for minorities and women, and especially when at the same time other EEO complaints by minorities and females were being actively processed and aggressively investigated**. (See Declaration of Frank Paul Lukacs.)

Plaintiff maintains that the purposeful and intentional total lack of any processing or investigation of his EEO complaints does give rise to a Title VII claim, for it is obvious that **Plaintiff's EEO complaints being from a white male against affirmative action were purposefully being "delayed" or simply intentionally not being independently investigated or processed for years and years and years and years and years precisely because they were EEO complaints from a white male against affirmative action, while at the same time other EEO complaints during those same five years were being actively and aggressively processed and actively and aggressively investigated simply because these EEO complaints were from minorities or females and hispanics.**

Please also note in exhibit "R", from OEO, NIH, DHHS, that it is none other than

Plaintiff's employer who is making the decision to (or not to) process and to (or not to) order an independent investigation according to 29 C.F.R 1614, contrary to the fact situation of the 1990 case of *Young v. Sullivan*, although from the case itself "Title VII provides a former employee a remedy against his or her employer" and "Plaintiff does allege that he was employed by NIH DHHS", and as per the seemingly innocuous, but in fact all important, paragraph which states that "Please be advised that this complaint is being processed pursuant to the provisions of Title 29 Code of Federal Regulations (CFR) Section 1614 which became effective October 1, 1992. Under these regulations you will be issued an investigative file along with an investigative summary.", it becomes obvious that the 1990 case of *Young v. Sullivan* was decided before "Title 29 Code of Federal Regulations (CFR) Section 1614 became effective October 1, 1992". Thus, Title VII does now create a cause of action for discrimination in the processing and investigation of EEO complaints since this is now a "term, condition, or privilege of employment".

""Once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of

that relationship. [FN5] In the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace. The contractual relationship of employment triggers the provision of Title VII governing "terms, conditions, or privileges of employment." Title VII in turn forbids discrimination on the basis of "race, color, religion, sex, or national origin.""

"FN5. Title VII also may be relevant in the absence of an existing employment relationship, as when an employer refuses to hire someone. See § 20003-2(a)(1). However, discrimination in that circumstance does not concern the "terms, conditions, or privileges of employment," which is the focus of the present case."

"Because the underlying employment relationship is contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract." *Hishon v. King & Spalding*, 467 U.S. 69, at 73 (1984)."

""Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term, condition, or privilege of employment. An

employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), [FN7] or that form "an aspect of the relationship between the employer and employees," *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971), [FN8] may not be afforded in a manner contrary to Title VII." *Hishon v. King & Spalding*, 467 U.S. 69, at 75-76 (1984).

"FN7. Senate Report No. 867 concerned S. 1937, which the Senate postponed indefinitely after it amended a House version of what ultimately became the Civil Rights Act of 1964. See 110 Cong. Rec. 14602 (1964). The Report is relevant here because S. 1937 contained language similar to that ultimately found in the Civil Rights Act. **It guaranteed "equal employment opportunity," which was defined to "include all the compensation, terms, conditions, and privileges of**

employment." S. Rep. No. 867, 88th Cong., 2d Sess., 24 (1964)." *Hishon v. King & Spalding*, 467 U.S. 69, at 76 (1984)."

"The reality of the situation is that a benefit is being conferred by the government upon federal government employees who are minorities and women and hispanics and asians, but that same benefit is being denied by the government to federal government employees who are white males. In this there is supposedly no harm. Complainant maintains that the amount of the benefit being given to minorities and women and hispanics and asians and at the same time being denied to white males is precisely the amount of the loss and harm and injury. Furthermore, if the benefit that is conferred upon minorities and women and hispanics and asians is regarded as a term, privilege, or condition of employment, for that is the precisely the way that the benefit was conferred initially, then the denial of that same benefit to white males is most certainly to be regarded as a term, privilege, or condition of employment."

ISSUE PRESENTED

Do federal government officials enjoy absolute immunity from suit or only qualified immunity from suit when their conduct has violated established statutory or

constitutional rights of which a reasonable person would have known?

"**The Supreme Court has held that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope"**, *Butz v. Economou*, 438 U.S. 478, at 506, 98 S.Ct. 2894, at 2910. "Damage actions against high officials were therefore "an important means of vindicating constitutional guarantees"." *Butz v. Economou*, 438 U.S. 478, at 506, 98 S.Ct. 2894, at 2910. **"Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] S 1983 and suits brought directly under the Constitution against federal officials"."** *Butz v. Economou*, 438 U.S. 478, at 504, 98 S.Ct. 2894, at 2909. "Having decided in Butz that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House." *Harlow v. Fitzgerald*, 457 U.S. 800, at 809. **"We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does**

not violate established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, at 818. ""The state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local district court."" *Harlow v. Fitzgerald* 457 U.S. 800, at 819. **"Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."** *Harlow v. Fitzgerald*, 457 U.S. 800, at 819. "We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties, and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available." *Harlow v. Fitzgerald*, 457 U.S. 800, at 819."

""Defense requiring a factual review to establish (as ordinarily occurs with qualified immunity, for example) should not be dismissed for failure to state a claim." 2 Moore's Federal Practice, § 12.34[4][b] (Matthew Bender 3d Ed., release 114 - 7/97). The following are cases cited by Moore's Federal Practice for the generalization that dismissal is improper if the defense requires a factual

review: "Defendant must establish that he had an objectively reasonable belief that his act violated no clearly established rights", *Young v. Selsky*, 41 F.3d 47, 54 (2d Cir. 1994). Qualified immunity may not always be established as a matter of law, *Black v. Coughlin*, 76 F.3d 72, 75 (2d Cir. 1996). Qualified or "good faith" immunity is affirmative defense that must be pleaded and proved by defendant, and therefore not appropriate basis for Fed. R. Civ. P. 12(b)(6) dismissal, *Anderson v. Coughlin*, 700 F.2d 37, 44 (2d Cir. 1983). "Trial courts ought not try to deal with [governmental immunity] on motions under [Rule] 12(b), when the proper disposition of the case requires some factual development by the parties", *Sutton v. United States*, 819 F.2d 1289, 1299 (5th Cir. 1987). Fed. R. Civ. P. 12(b)(6) dismissal premature because plaintiff should have had opportunity for discovery on qualified immunity defense, *Stock W. Corp. v. Taylor*, 942 F.2d 655, 658 (9th Cir. 1991)."

"*Holloway v. Bentsen*, 870 F.Supp. 898, (N.D. Ind. 1994), previously cited by Defendants, contains such statements as" ... **"cases that have allowed federal employees to proceed against both the head of their department or agency under Title VII and against their supervisors individually",**

including "*Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1414-1416, (D.C.Cir. 1985) (**allowing federal employees to sue their employers "for constitutional violations against which Title VII provides no protection at all"**)". *Baird v. Haith*, 724 F.Supp 367, at 373 (D.Md. 1988)"

"***Baird v. Haith*, 724 F.Supp 367, (D.Md. 1988) also states that "As noted above, the *Brown* decision did not purport to address the liability of individual defendants. The Court of Appeals for the Fourth Circuit has explicitly reserved ruling on whether S 717 of Title VII pre-empts a Fifth Amendment cause of action against individual federal supervisors in an employment discrimination case, *Chisholm v. United States Postal Service*, 665 F.2d 482, 489 n. 10 (4th Cir. 1981), and has not addressed the issue with respect to other causes of action." *Baird v. Haith*, 724 F.Supp 367, at 378 (D.Md. 1988)."**

ISSUE PRESENTED

Since matters outside the pleadings were presented to and not excluded by the district court, should the Rule 12 (b) (6) motion to dismiss for failure of the pleadings to state a claim upon which relief can be granted have been treated as one for summary judgment and disposed of as provided in Rule 56, and should

all parties have been given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56, which reasonable opportunity plaintiff pro se was not given, and **should plaintiff have been afforded an opportunity for reasonable discovery**, and should the district court have sent plaintiff pro se who is not a practicing attorney, with this being plaintiff pro se's first civil action, a so called "Rule 12 Rule 56 Letter" in PJM-96-2913 which it failed to do and which the district court thereafter did repeatedly sent plaintiff pro se in PJM-97-379, PJM-97-3359, PJM-97-3483, and in PJM-97-3495 apprising him of the consequences of a Rule 12 or a Rule 56 motion and the appropriate procedures to be followed, including directions for the filing of a declaration, since **plaintiffs proceeding pro se are entitled to have notice of their right to file affidavits and responsive material** to prevent summary judgment against them?

"Rule 12(b) specifically states that, "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material

made pertinent to such a motion by Rule 56".

"If in support of such a motion, matters outside the pleadings are presented, and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of under rule 56". *Carter v. Stanton*, 405 U.S. 669, 92 S. Ct. 1232, 31 L.Ed. 2d 569 (1972). In such cases, Rule 12 provides that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company New York, New York, page 173. In addition "Ordinarily, if the court accepts material outside the pleadings from one party, it must convert the motion to one for summary judgment under Rule 56 and allow all parties to submit additional information", Id. at page 174, and "generally documents not attached to a complaint or expressly incorporated thereto, may not be considered unless the motion to dismiss is converted into a motion for summary judgment", Id. at page 174. Thus a decision on Rule 12 (b) (6) is no longer appropriate in this case where "matters outside the pleadings are presented to and not excluded by the court". In addition, in such cases, Rule 12(b) itself provides that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by

Rule 56"", which reasonable opportunity the district court judge has most definitely not given.

"**Motion to dismiss treated as motion for summary judgment.** *Bowring v. Chairman, Va. Parole Board*, 436 F.Supp. 339 (W.D. Va. 1977), aff'd, 573 F.2d 1304 (4th Cir. 1978)." "**Where the parties have submitted materials in addition to their pleadings, the court will treat defendants' preliminary motion to dismiss and/or for summary judgment as one for summary judgment.** *Edlridge v. Bouchard*, 620 F.Supp. 678 (W.D. Va. 1985)." "**The rules require that if the court does consider "matters outside the complaint" it must convert the motion into a motion for summary judgment, affording the parties a "reasonable opportunity to present all material made pertinent to such a motion".** *Gasner v. County of Dinwiddie*, 162 F.R.D. 280 (E.D. Va. 1995), aff'd, 103 F.3d 351 (4th Cir. 1996)." "**Motion for dismissal treated as one for summary judgment where matters outside pleadings attached.** *Wooldridge v. Virginia*, 453 F.Supp. 1333 (E.D. Va. 1978)." "**Where plaintiff was not afforded an opportunity for reasonable discovery, the district court's treatment of defendants' motion to dismiss as a motion for summary judgment was an abuse of discretion.** *Gay v. Wall*, 761 F.2d 175 (4th Cir. 1985)."

"**Notice to pro se litigant of right to file affidavits and responsive material.** Once evidence has been submitted by the movant in a motion for summary judgment, it is the responsibility of the opposing party to introduce its own evidentiary material to the contrary. **Plaintiffs proceeding pro se, however, are entitled to have notice of their right to file affidavits and responsive material to prevent summary judgment against them.** Davis v. City of Portsmouth, 579 F.Supp. 1205 (E.D. Va. 1983), aff'd, 742 F.2d 1448 (4th Cir. 1984).

ISSUE PRESENTED

Is there only the one variant used by the district court of a prima facie case of indirect discrimination as originally set forth in *McDonnell Douglass*, or should the district court have considered one of the other more appropriate forms for a prima facie case?

"The Court uses only one variant of indirect discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), namely that "1. He is a member of a protected class; 2. His employer did not promote him to a given position; 3. The employer placed someone else in the position outside the protected group; and 4. That he was qualified for the position.", citing *Texas Dept. of*

Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994).

Although the Court admits that plaintiff meets these prima facie criteria, the Court refuses to acknowledge that the second variant of indirect discrimination, which is actually the original one set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, at 802-804, (1973) is that "(1) he/she is a member of a protected group; (2) he/she applied and was qualified for the position; (3) he/she was rejected; and (4) the position remained open and the employer continued to seek applicants". For those who have actually read the case, which the district court judge obviously has not done, the exact words are "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications", *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, at 802, (1973). In this particular variant, the element that is not necessary is that "The

employer placed someone else in the position outside the protected group", and instead this element is replaced with "the position remained open and the employer continued to seek applicants".

The Court also refuses to acknowledge that another variant of indirect discrimination is that "(1) he was a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination", *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, at 802-804, (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *Amirmokri v. Baltimore Gas & Electric Company*, 60 F.3d 1126, 1129 (4th Cir. 1995), which is even introduced by none other than defendants themselves on page 19 of their memorandum of February 18, 1997 (See paper numbered 21 of the docket sheet). In this particular variant, the element that is not necessary is that "The employer placed someone else in the position outside the protected group", or that "the position remained open and the employer continued to seek applicants" and instead this element is replaced with "he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination". This is the

situation in all of plaintiff's nonselections for plaintiff "was rejected for the position under circumstances giving rise to an inference of unlawful discrimination", for all of the positions were Federal Equal Opportunity Recruitment Program (FEORP) or Affirmative Employment Program (AEP) or so called affirmative action or diversity program designated positions for minorities and females and hispanics. There are many elements of the Federal Equal Opportunity Recruitment Program (FEORP) or the Affirmative Employment Program (AEP) or the so called affirmative action or diversity program which are in and of themselves discriminatory, and which cumulatively have the intended effect of discriminating against white males, or of being a negative action program against white males, although being rather benignly and incorrectly characterized as being only an affirmative action program for minorities and females and hispanics. The elements of FEORP or AEP or affirmative action or diversity including but not limited to those elements referring to the federal government's Federal Equal Opportunity Recruitment Program (FEORP), as well as the National Institute of Health's Federal Equal Opportunity Recruitment Program (FEORP) and the National Institute of Health's Affirmative Employment Program (AEP), are all especially important as evidence that Plaintiff was "rejected for the position under circumstances giving rise to an inference of

unlawful discrimination"."

ISSUE PRESENTED

Although plaintiff-appellant has shown several specific facts demonstrating the existence of several genuine issues of material fact for trial through concrete evidence, has the district court judge appointed by the pro affirmative action President Clinton simply chosen to ignore all of the genuine issues of material fact, including simply ignoring plaintiff-appellant's Rule 56(f) affidavit, and **should plaintiff have been afforded an opportunity for reasonable discovery and an adequate time for discovery**?

"Rule 56(f) states "When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Plaintiff-appellant submitted a Rule 56(f) affidavit. The Rule 56(f) affidavit was completely ignored by the district court.

Defendants begin and end their argument regarding summary judgment with the Supreme Court case of *Celotex Corporation v. Catrett*, 477 U.S. 316 (1986). "Administratrix of estate of deceased worker brought action against asbestos manufacturer. The United States District Court for the District of Columbia granted manufacturer's motion for summary judgment and administratrix appealed. The Court of Appeals for the District of Columbia Circuit, 756 F.2d 181, reversed. The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment **after adequate time for discovery** against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in the form that would be admissible at trial in order to avoid summary judgment." The Court itself stated that "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v.*

Catrett, 477 U.S. at 323. Rule 56(c) itself provides that "The judgment sought shall be rendered forthwith **if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,** show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case where the Defendants themselves have simply refused to process Plaintiff's EEO complaints and complete, in fact even begin, the mandatory independent investigations as per 29 C.F.R. 1614, within 180 days, or even within five years for that matter, and although Plaintiff maintains that it has already produced sufficient "genuine issues of material facts" to defeat the motion for summary judgment, since even the Supreme Court has stated that "Rule 56(e) permits a proper summary judgment to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c)", *Celotex Corporation v. Catrett*, 477 U.S. at 324, namely in this case "**depositions and answers to interrogatories**", it would be patently unfair to grant the motion for summary judgment at this stage. "Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), [FN6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, **if the nonmoving party has not had an opportunity to make full discovery.**

FN6. Rule 56(f) provides: Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, **the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had** or may make such other order as is just." *Celotex Corporation v. Catrett*, 477 U.S. at 326-327. In this case, if it is not obvious to everyone yet, what Plaintiff really wants is an opportunity at depositions and discovery, precisely that which Defendants do not want Plaintiff to have, before a decision on the motions for summary judgment.

The other Supreme Court case cited by Defendants is *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). What Defendants did not bother telling this court is that "Rule 56(e) provides that, when a properly supported motion for summary judgment is made, [FN4] the adverse party "must set forth specific facts showing that there is a genuine issue for trial." [FN5] ... FN5. This requirement in turn is qualified by Rule 56(f)'s provision that **summary judgment is refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity**

for discovery." *Anderson v. Liberty Lobby,* Inc. 477 U.S. 242, at 250."

"Summary judgment should be entered only after adequate time for discovery. *RGI, Inc. v. Unified Indus., Inc.*, 963 F.2d 658 (4th Cir. 1991)." "Where the credibility of depositions is, or may be crucial, summary judgment becomes improper and a trial indispensible. *Cales v. C & O Ry.*, 46 F.R.D. 36 (W.D. Va. 1969)." "**Opportunity to discover. The requirement that the non-moving party respond specifically to a summary judgment motion is qualified by subdivision (f)'s requirement that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.** Nguyen v. CNA Corp., 44 F.3d 234 (4th Cir. 1995)."

APPENDIX ZZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*02\18\99
FRANK PAUL LUKACS	*USCAFC Docket #
Plaintiff	*99-1108
v.	*
DONNA E. SHALALA, et al.	*D. of Maryland #
Defendants	*CA-96-2913-PJM
* * * * * * * * * * * * * * *	

ATTACHMENT TO
PLAINTIFF-APPELLANT'S INFORMAL BRIEF
PURSUANT TO LOCAL RULE 34(B)

I Introduction

The Court claims that it is "upon consideration of the pleadings and the record herein" that it makes its determination, but in fact that is not true. The Court acknowledges that "Lukacs initiated what eventually totalled in excess of 50 EEO complaints", but the Court itself limits its decision to only a half a dozen of plaintiff's separate and distinct individual EEO complaints dealing with vacancy announcements CA-91-0014, OD-91-0063, CA-91-0159, OD-91-0162, the NIH Management Cadre Program, and the NIH Relocation Reimbursement Policy. The Court purposefully ignores the other four

dozen of plaintiff's separate and distinct Equal Employment Opportunity complaints filed according to the relevant rules and regulations within 45 days of an event (formerly within 30 days of an event) (See Exhibit "10".) (See filed and docketed papers numbered 60, 61, 62, 63, 64, 65, 66, and 67 of the docket sheet.) in its memorandum and opinions of PJM-96-2913. The district court nevertheless later wants to apply res judicata as to all four dozen of plaintiff's EEO complaints on which the district court itself simply refuses to render "a final judgment on the merits", and ignores the fact that the "matters did not arise from the same facts, occurrences, or transactions that were the basis of a prior action". (See Exhibit "11".) The reality of the matter is that it was the district court itself who simply refused to allow plaintiff to "fully raise these matters", and thus because of the district court's own inappropriate and incorrect actions these "matters could not possibly have been fully raised". ...

As to Vacancy Announcement CA-91-0159 the Court incorrectly states that it "was canceled and for which no one was hired". First of all the Court ignores the fact that contrary to the relevant personnel rules and regulations the rating criteria upon which selection was supposed to have been made purposefully did not give any credit at all for any of

plaintiff's education, or allow the substitution of education for experience as per the relevant personnel rules and regulations, and also did not give any credit at all for a lot of his other merit and qualifications, just so that a less qualified or an even totally unqualified minority or female or hispanic could be selected. (See exhibit "2".) Second the court wants to ignore the fact that the black female selecting official purposefully tried to hide the fact that contrary to the relevant personnel rules and regulations she only interviewed females for the position, namely Jacqueline Dennis, Kathleen Kettofsky, Barbara Hemelt, Catherine Kellington, and Elizabeth Bosmajian, and that she interviewed no males, much less any white males. (See Exhibit "13".) Third the court wants to ignore the fact that the selecting official did actually select and hire a female, one by the name of Catherine Kellington, who was at the time a GS-11, while plaintiff had already been a GS-11 for one year and was by then a GS-12. (See Exhibit "13".) All of which still ignores the fact that plaintiff as a white male was neither interviewed, which itself is a violation of the relevant personnel rules and regulations, nor selected, all under the circumstances of this vacancy announcement being a FEORP and an AEP so called affirmative action position with FEORP and AEP **selection and hiring** procedures intended for the

selection of a minorities and females and hispanics. (See Exhibit "14".) (See Exhibit "15".) (See Exhibit "16".) ...

As before, as to Vacancy Announcement OD-91-0162 the Court again incorrectly states that it "was never filled". In fact the position was filled by "hiring two trainees", (with "trainees" being the euphemism given to minorities or females and hispanics who are totally unqualified for the advertised position, but who are hired nevertheless, for supposedly with a lot of training they may one day become qualified for the positions for which they were totally unqualified when they were hired). (See Exhibit "17".) (See Exhibit "18".) In addition the district ignores the fact that contrary to the relevant personnel rules and regulations the rating criteria upon which selection was supposed to have been made purposefully did not give any credit at all for any of plaintiff's education, or allow the substitution of education for experience as per the relevant personnel rules and regulations, and also did not give any credit at all for a lot of his other merit and qualifications, just so that a less qualified or an even totally unqualified minority or female or hispanic could be selected. (See Exhibit "3".) (See Exhibit "4".) ...

Regarding NIH's Relocation Reimbursement Policy, the actual "decision to reimburse new

appointees is made **after** an actual selection is made and not before there is a selection", for according to the federal budget rules and regulations the federal government cannot possibly reimburse anyone for reimbursement expenses until after they are hired. All of this totally ignores the fact that from before July 13, 1992 (See Exhibit "22".) to after September 25, 1995 (See Exhibit "23"), on every NIH Vacancy was the very specific paragraph which stated that "Under the Affirmative Employment Program, minorities, women and persons with disabilities have been found to be underrepresented in the following GS series: 201, 334, 343, 401, 403, 404, 601, 644, 1101, 1102, 1320, 1410, and 1412. Relocation expenses may be paid for authorized target group candidates from outside the commuting area." The Court want to totally ignore the fact that "Relocation expenses may be paid for authorized target group candidates, namely under the Affirmative Employment Program minorities and women, from outside the commuting area." The Court's analysis is devoid of any logic and merit, and to use the words of the Court itself "this one is met and dispatched quickly", for by the very definition of "underrepresentation" (See Exhibit "24".) "in the following GS series: 201, 334, 343, 401, 403, 404, 601, 644, 1101, 1102, 1320, 1410, and 1412" supposedly there is an overabundance of qualified minorities and women in the commuting area, so that there

should be never be an "expected difficulty of recruiting qualified applicants" from within the commuting area. Furthermore, as is obvious from the job vacancy announcements themselves, (See Exhibits "22".) (See Exhibit "23"), the "nature of the position" merely refers to the statement of "Under the Affirmative Employment Program, minorities, women and persons with disabilities have been found to be underrepresented in the following GS series: 201, 334, 343, 401, 403, 404, 601, 644, 1101, 1102, 1320, 1410, and 1412." Thus by the job vacancy announcements themselves which specifically refer to only "minorities and women" being even eligible as "authorized target group candidates" for the "reimbursement of relocation of expenses", it is Defendants own published statements which "rebut the statement" that "Race, gender, sex, national origin, and age never enter into the question". ...

II FRCP Rule 12(B)(6) & FRCP Rule 56

29 C.F.R. § 1614 specifically states that: "The complainant, **the agency**, and any employee of the Federal agency **shall produce** such documentary and testimonial **evidence** as the investigator deems necessary", and that "the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint".

Unfortunately, when **the agency** itself does not **produce** the **evidence**, much less comply with the requirement that "the agency shall complete its investigation within 180 days of the filing of the individual complaint" or with the requirement that "within 180 days from the filing of the complaint, ... the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file" which is supposed to contain all of the **evidence** in the first place, as required by 29 C.F.R. § 1614, and in fact when the agency itself completely ignores the entire requirement for a mandatory independent investigation as per 29 C.F.R. § 1614 in which **the agency** itself was supposed to have **produce**d the **evidence**, it is nevertheless the agency itself who as in PJM-96-2913 has the audacity and unmitigated gall to base their entire case upon statements such as "plaintiff has presented no evidence", "plaintiff fails to present any evidence", "there is no evidence", "he has presented no evidence", "plaintiff has offered no evidence", "plaintiff has offered no evidence", "plaintiff has presented no evidence", and "plaintiff has presented no evidence", when in actuality it is the **agency** itself who has not **produce**d the **evidence**." ...

III Qualified Immunity

"Plaintiff maintains that "the uncontradicted evidence is that" "individual employees discriminated against plaintiff", and have in fact created and maintained a permanent so called affirmative action and diversity program for minorities and females and hispanics which is unconstitutional. As such, Plaintiff has the right to name them as defendants."

Unfortunately all of the district court's cases are before the Civil Rights Act of 1991, with the relevant dates of the cited cases being 1990, 1990, and 1989. The cases unfortunately only deal with individual federal employees under Title VII, and does not address the issue of causes of action **"for constitutional violations against which Title VII provides no protection at all"**, and are therefore irrelevant and inapplicable. ...

IV A Race and Gender

The Court starts section IV with "Lukacs alleges that he was discriminated against on the basis of **race and gender**", which is correct in that plaintiff alleges that he was discriminated against because he is a **white male**. Then the court begins talking of "race **or** sex" and "race **or** gender", which is an incorrect analysis, for the selection of a

black male and a white female does not equate to the selection of a white male. By the Defendant's and this Court's rather incorrect analysis since a black male was selected there is no gender discrimination, and since a white female was selected there is no race discrimination, and therefore there was no sex **or** race discrimination. However, the fact still remains that there was still no white male selected, and therefore there has been **race and sex** discrimination.

As plaintiff has previously stated:

"Plaintiff has both a racial identity and a gender identity, and Plaintiff claims discrimination on being both white and male. Thus Plaintiff is not only claiming race discrimination because he is white, and Plaintiff is not only claiming sex discrimination because he is a male, but Plaintiff is also claiming a combination of both race discrimination and sex discrimination for he is, unfortunately both politically incorrect and politically unpopular, namely a white male. The term of "compound discrimination" was first suggested by Professor Shoben in her article "Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination", 55 N.Y.U. L. Rev. 793 (1980).

The Court states that "Lukacs pleads no direct discrimination regarding race or gender". That is not true. As plaintiff has repeatedly stated:

... The statutes of 5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d), the regulations of 5 C.F.R. §720, including but not limited to, elements of 5 C.F.R. §720.202 (e), especially those referring to qualifiable minorities and women, elements of 5 C.F.R. §720.202 (a), especially those referring to women, and elements of 5 C.F.R. §720.205 (a) and 5 C.F.R. §720.205 (e), especially those referring to the appropriate labor force, the FEORP regulations on underrepresentation and classifications on the basis of race and gender, the United States Equal Employment Opportunity Commission's "Instructions for the Development and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates", Executive Order 11478 as amended by Executive Order 12106 which established requirements for federal agency Affirmative Employment Programs, the Office of Personnel Management classification of minorities by race and national origin under the FEORP, Attachment 1 to FPM Letter 720-2, the FEORP rules and guidelines, the AEP rules and guidelines, and the Career Opportunities Training Program (COTA) all employ racial classifications and gender classifications and national origin classifications."

IV A Prima Facie Cases of Discrimination

The Court uses only one variant of indirect discrimination, namely that "1. He is a member of a protected class; 2. His employer did not promote him to a given position; 3. The employer placed someone else in the position outside the protected group; and 4. That he was qualified for the position.".

Although the Court admits that plaintiff meets these prima facie criteria, the Court refuses to acknowledge that the second variant of indirect discrimination, which is actually the original one, is that "(1) he/she is a member of a protected group; (2) he/she applied and was qualified for the position; (3) he/she was rejected; and (4) the position remained open and the employer continued to seek applicants". For those who have actually read the case, which the district court judge obviously has not done, the exact words are "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to

seek applicants from persons of complainant's qualifications". In this particular variant, the element that is not necessary is that "The employer placed someone else in the position outside the protected group", and instead this element is replaced with "the position remained open and the employer continued to seek applicants". This is precisely the situation in CA-91-0159 in which the black female selecting official after interviewing only females actually selected a female who accepted the offer, but who afterwards "accepted another job offer", and then ordered that "the vacancy [be] re-advertised" so that the position would remain open and the employer could continue to seek applicants. (See Exhibit "13".) The real reason that the district court judge refuses to even consider the original formulation is simply too obvious to belabor.

The Court also refuses to acknowledge that another variant of indirect discrimination is that "(1) he was a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination", which is even introduced by none other than defendants themselves on page 19 of their memorandum of February 18, 1997 (See paper numbered 21 of the docket sheet). In this particular variant, the element that is not

necessary is that "The employer placed someone else in the position outside the protected group", or that "the position remained open and the employer continued to seek applicants" and instead this element is replaced with "he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination". This is the situation in all of plaintiff's nonselections for plaintiff "was rejected for the position under circumstances giving rise to an inference of unlawful discrimination", for all of the positions were Federal Equal Opportunity Recruitment Program (FEORP) or Affirmative Employment Program (AEP) or a so called affirmative action program designated positions for minorities and females and hispanics. There are many elements of the Federal Equal Opportunity Recruitment Program (FEORP) or the Affirmative Employment Program (AEP) or the so called affirmative action program which are in and of themselves discriminatory, and which cumulatively have the intended effect of discriminating against white males, or of being a negative action program against white males, although being rather benignly and incorrectly characterized as being only an affirmative action program for minorities and females and hispanics. The elements of FEORP or AEP or affirmative action or diversity including but not limited to those elements referring to the federal government's Federal Equal Opportunity

Recruitment Program (FEORP), as well as the National Institute of Health's Federal Equal Opportunity Recruitment Program (FEORP) and the National Institute of Health's Affirmative Employment Program (AEP), are all especially important as evidence that Plaintiff was "rejected for the position under circumstances giving rise to an inference of unlawful discrimination".

IV B Contract Specialist Job Vacancy Announcements

"As to two of the job vacancies Lukacs was not selected for, his claims are easily disposed of." "Lukacs can easily make out a prima facie case for discrimination", and in fact "**Lukacs can easily make out three prima facie cases for discrimination**", in CA-91-0159, (i) for a female was selected, and thus "the employer placed someone else in the position outside the protected group", the vacancy was readvertised. (See Exhibit "13".) (See Exhibit "29"), (ii) "the position remained open and the employer continued to seek applicants", (See Exhibit "13".) (iii) and since the opening was openly designated and publicly announced as a FEORP or AEP or affirmative action or diversity program for minorities and females and hispanics in addition "he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination", (See

Exhibit "22".) (See Exhibit "23".) (See Exhibit "19".) (See Exhibit "20".) (See Exhibit "21".).

Furthermore, "As to two of the job vacancies Lukacs was not selected for, his claims are easily disposed of." "Lukacs can easily make out a prima facie case for discrimination", and in fact "**Lukacs can easily make out at least two and perhaps even three prima facie cases for discrimination**", in what the court incorrectly refers to as CA-91-0162, which is really OD-91-0162, not that the Court either knows or cares about the difference between CA and OD, for the Court starts off its very second sentence of part I of the supposed "facts" admitting that it does not even know where plaintiff worked all those years, whether in CA or in OD, (i) for if the facts according to the district court judge is correct that "no one of any category was selected" then by the relevant rules and regulations the vacancy had to have been readvertised and thus "the position remained open and the employer continued to seek applicants",(See Exhibit "13".), but in fact (ii) two totally unqualified minority or female "trainees" were selected, and thus "the employer placed someone else in the position outside the protected group", (See Exhibit "17".), and (iii) since the opening was FEORP or AEP or so called affirmative action for minorities and females designated, in addition "he was rejected for the position under

circumstances giving rise to an inference of unlawful discrimination" (See Exhibit "22".) (See Exhibit "23".) (See Exhibit "19".) (See Exhibit "20".) (See Exhibit "21".).

So much for the district court's deception and totally incorrect analysis which totally ignores the real facts, for to do that would of course demonstrate genuine issues of material fact. Furthermore, although plaintiff was not only "qualified for the position" for all of his contract specialist positions, and in fact was "among the best qualified applicants for each position" to use the words of Defendants themselves (See Exhibit "30".), plaintiff was never selected for any of these FEORP or AEP or affirmative action or diversity designated openings, which contrary to the district court's incorrect analysis, is in an of itself "an adverse employment action".

The Court incorrectly asserts that the 33 year old African American female Bernice Evans who was selected by the African American female Beverly Lott Wyatt was "in fact better qualified than he" simply because supposedly "the selectee had over 14 years experience". What the court neglects to mention is that since she was 33 years old and already had 14 years experience that therefore she only had a high school education (See Exhibit "29"), as opposed to plaintiff's undergraduate education and graduate and professional education, which endeavor itself consumed 14 years of

plaintiff's life, for which he never received any credit on the rating criteria upon which selection was supposed to be made (See Exhibit "2"), that she merely had 140 hours (at the rate of 40 hours of week) of so called "procurement" courses, none of which were for the advertised position of "contract specialist", with plaintiff having had that much during his first few months in the federal government, and that plaintiff had three times as many credit hours of procurement courses which is one of the reasons plaintiff was already a "Level II Contracts Official", (See Exhibit "31".) during which supposedly impressive length of 14 years she was merely a procurement clerk doing mostly filing (See Exhibit "29".) (See Exhibit "32".), that she had just become merely a GS-09 (See Exhibit "33".), while plaintiff had already been a GS-09 for one year and a GS-11 for one year and was already a GS-12, and that she had never for one day ever been a "contract specialist", (See Exhibit "29".) with let us not forget the job vacancy having been for a "contract specialist", (See Exhibit "33"), and with plaintiff having been a "contract specialist" for several years by then. Furthermore, there were 61 supposedly best qualified applicants for this FEORP and AEP opening, (See Exhibit "33".), totally contrary to the relevant personnel rules and regulations which limit the best qualified designation to the top 3 to

5 applicants to be interviewed by the selecting official, just so that a much less qualified minority or female, and in this case a minority female, who would never even be interviewed, can nevertheless be selected. Thus there is plenty of evidence to suggest "that the reason asserted by Defendant for the selection of the person was merely a pretext for discrimination".

The court is incorrect that "vacancy announcement No. OD-91-0063" was "a contract specialist position filled by a white female", for although a white female selecting official Carol Marcotte did select a white female Diane Kelly under the vacancy announcement, a 27 year old black male Gregory Holliday was also selected by Frank Weston a black male selecting official under the same vacancy announcement (See Exhibit "34".). The Court cites plaintiff's supposed lack of extensive experience in acquiring automatic data processing, but this supposed requirement is nowhere to be found in the job vacancy announcement itself upon which selection is supposed to be made, (See Exhibit "4"), and which also did not give plaintiff any credit for any of his years of education or allow the substitution of education for experience, usually on a year for year basis, as required by the relevant personnel rules and regulations, and which totally ignores the fact that although plaintiff supposedly lacked extensive experience in acquiring automatic

data processing, the black male selected had absolutely no experience at all in acquiring automatic data processing. In addition what the Court totally ignores is that the job vacancy announcement in OD-91-0063 was for "5 jobs" (See Exhibit "35".), namely that there were five openings to be filled, and not just one or even two, and there is no explanation at all as to why plaintiff was not hired for the third or the fourth or even the fifth job opening. Even this pro affirmative action district court judge is unable apparently to adequately explain just what ever happened in the second, third, fourth, and fifth job openings of OD-91-0063. Furthermore, there were 69 supposedly best qualified applicants for this FEORP and AEP and affirmative action and diversity opening, (See Exhibit "34".), totally contrary to the relevant personnel rules and regulations which limit the best qualified designation to the top 3 to 5 applicants to be interviewed by the selecting official, just so that a much less qualified minority or female, who would never even be interviewed, can nevertheless be selected. Thus in actuality "Lukacs responds with plenty of evidence indicating pretext".

The reality of the matter is that without any discovery at all, and with defendants having purposefully violated 29 C.F.R. § 1614 regarding the mandatory processing and investigation of this white male plaintiff's EEO complaints, while Defendants vigorously

processed and investigated the EEO complaints of minorities and females, just so that this white male would not have the evidence which would have been produced with the mandatory and even promised processing and investigation under 29 C.F.R. § 1614 (See Exhibit "36".) (See Exhibit "28".), it has been difficult at best for plaintiff to produce the evidence which defendants should have provided plaintiff during the mandatory investigation which defendants never even began in 1991, much less completed within the mandatory 180 days.

IV C NIH's Management Cadre Program

Contrary to the District Court's "blanket assertions", it is the District Court itself who "does not aid its cause by blanket assertions", for it is the district court judge who himself refers to the fact that "various of NIH's **hiring** policies are discriminatory", and in addition are evidence of direct discrimination and an intent to discriminate. (See Exhibit "14".) (See Exhibit "15".) (See Exhibit "16".) (And this evidence is all without benefit of the mandatory 29 C.F.R. § 1614 investigation or discovery.) Although in the subsequent section the district court makes the incorrect "blanket assertion" that "FEORP and AEP are [only] designed to encourage minorities to **apply** for vacancies", and therefore "pass the

test of strict scrutiny", namely that the classifications serve a compelling government interest, which they do not, and are narrowly tailored measures, which they are not, it is the district court itself which correctly characterizes, in a totally self contradictory statement, "various of NIH's **hiring** policies", thereby itself defeating its own reasons as to its legally incorrect conclusion that FEORP and AEP do "not violate the Equal Protection Clause of the Fourteenth" and "pass the test of strict scrutiny", which they do not.

The Court readily admits of "NIH's Management Cadre Program" "the fact that of 12 persons selected for the program during the period in question, 10 were women and 2 were minority males" and that there were no white males selected, (See Exhibit "37".) and that it is "true that the program has a "special emphasis ... directed toward women, minorities, and employees with disabilities" and that it was a FEORP and an AEP and a so called affirmative action and diversity program for minorities and females.

The court readily admits that plaintiff has made out a prima facie case of discrimination, either by "1. He is a member of a protected class; 2. His employer did not promote him to a given position; 3. The employer placed someone else in the position outside the protected group; and 4. That he was qualified for the position." or by "(1) he was a member of a protected group; (2) he

applied for the position in question; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination". The Court does not even make any attempts at a "legitimate non-discriminatory reason for [white male] plaintiff's nonselection" and the Court in its loud silence readily admits that the complete absence of a credible reason is equivalent to a pretext for illicit discrimination. The Court tries to play word games by noting that "Four qualified **applicants** were white; two were males, and three were over age 44. The record is silent as to the national origin of any of the **applicants**." The District Court judge in its carefully chosen words is attempting to deceive a quick reading Appellate Court by using the word "**applicants**" and tries to leave the false impression and misrepresentation that merely having "**applicants**", four of which were white, which may have been white females, and two of which were males, which may have been black males, (and even if they were two white male "**applicants**", one of which was plaintiff, that merely demonstrates just how much white males are deterred from even being "**applicants**" for publicly announced so called affirmative action or diversity programs for minorities and females which amounts to a "**white males need not apply**" signal), is the same as having white males actually being "**selected**" or

"**hired**", for the reality of the matter is that none of the four white "**applicants**" to which the judge refers were ever "**selected**" or "**hired**".

The District Court now having admitted that plaintiff has stated a prima facie case of discrimination and that all "asserted reasons were in fact a pretext for illicit discrimination", now tries to confuse the issues and state that these admitted facts still do "not make it unconstitutional or a violation of Title VII". Even though the record amply demonstrates that "**minorities and women were given preferential treatment in the hiring for the positions**", since supposedly "the positions are not set aside for them", even though the probability of twelve out of twelve selected being non white males is less than 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X 1/2 X = 1/4096 or .0002, so that these results happening by pure chance are only about one out of four thousand (LOTTO!), which is an indication of just how good proponents of affirmative action really are when they announce an affirmative action opening for minorities and females. Call it whatever you want, preferences or favoritism, **the facts themselves prove that these twelve management cadre positions were in fact publicly announced as being all intended for minorities and females, special illegal FEORP procedures were instituted to ensure the**

intended results, and the results themselves prove that these twelve positions were all given to minorities and females.

IV D FEORP and AEP and *Adarand*

The Court again proves that it doesn't really care about even checking the accuracy of any of the facts when it refers to the "Federal Employment Opportunity Recruitment Program", which is really the "Federal Equal Opportunity Recruitment Program", (FEORP) and the Affirmative Employment Program (AEP) as supposedly not being "set aside programs" and therefore being constitutional. **The Court specifically states that "unlike the set-aside programs in *Adarand*" and "In *Adarand* the program at issue was clearly a set-aside." The Court obviously has not read *Adarand*, nor anything which plaintiff has specifically quoted from *Adarand* to come to such a totally incorrect and ridiculous interpretation of *Adarand*. "In *Adarand* the program at issue was most certainly not a set-aside". Similarly FEORP and AEP are not just designed to encourage minorities and females to apply for vacancies, and correspondingly discourage white males not to apply for vacancies by reminding them that "white males need not apply", but a sophisticated system of procedures employed in the selection and hiring process which give preferences and**

favoritism to minorities and females and which substantially increase the probability, almost to a point of certainly, that a minority or female will be selected or hired. (See Exhibit "14". See Exhibit "15". See Exhibit "16". See Exhibit "19". See Exhibit "20". See Exhibit "21". See Exhibit "22". See Exhibit "23". See Exhibit "24".)

As an example, how can the Court with a straight face even say that the form entitled "Feorp Target Series Merit Promotion Documentation" which has to be filled out by every selecting official and which specifically states "As you interview the Best Qualified candidates on the attached certificate, it will be necessary for you to gather information on their minority and handicapped status. Please fill out the form below and return it to the Personnel Office with the Merit Promotion Certificate.", and then the Selecting Official has to specifically note whether the interviewed candidate was a "male" or a "female", and whether the interviewed candidate was a "non-minority" or a "black" or a "hispanic" or an "American Indian" or an "Asian Pacific Islander" and in the end "Please indicate the race and sex of you selectee" (See Exhibit "16".), is only "designed to encourage minorities to **apply** for vacancies" and has nothing to do with their **selection** or **hiring**? Come on now, only an idiot would actually believe that. What does the preceding have to

do with encouraging minorities and females to **apply** for vacancies, and how is the preceding not related to **selection** or **hiring**?

Furthermore, how can the Court with a straight face state that the form which has to be filled out by every selecting official whenever they by mistake just happen to try to hire the most qualified white male, but does not have to be filled out by the selecting official whenever they hire an even totally unqualified minority or female, entitled "Justification for the Selection of a Non-Minority Candidate for a Federal Equal Opportunity Recruitment Program (FEORP)", and which begs of the "FEORP Target Manager", whose specific job description and even performance appraisal is totally dependent upon making sure that more minorities and females are actually **selected** and **hired**, "With your approval, I would like to make the selection of a non-minority candidate for the position. My reasons are as follows: No minorities were referred on the certificate or Attached I have explained the work related reasons for selecting a non minority candidate. You will find an in depth comparison of the qualifications of minority candidates vs. the selected." (See Exhibit "15". See Exhibit "38".) is only "designed to encourage minorities to **apply** for vacancies" and has nothing to do with their **selection** or **hiring**? Come on now, only an idiot would actually believe that. Everybody in the

federal government knows just how difficult and almost impossible such a "J & A" or "Justification And Approval" is to get, which is entirely its purpose, to make it difficult and almost impossible to hire white males. Not only that, anyone actually stupid enough to even try such a "justification and approval" has to be aware that such acts of disloyalty and treason in writing against the allegiance to affirmative action for minorities and females is remembered and considered when it comes time for evaluation and promotion.

The District Court then again tries to deceive the Appellate Court by quoting from the "Public Health Service Federal Personnel Manual Instructions", which plaintiff himself introduced as evidence of his claim of breach of contract, and totally ignores the fact that the elements of FEORP and AEP specifically violate the quoted section of the "Public Health Service Federal Personnel Manual Instructions". Thus the district court judge himself proves, by his own quotation, that there were specific statutes and rules and regulations and guidelines and instructions in plaintiff-appellant's employment contract. As plaintiff has frequently stated:

"As a civilian federal government employee, there was an express and in the alternative an implied employment contract between plaintiff and the United States federal government, and in fact this

employment contract included the relevant personnel related statutes, rules, and regulations, which specifically enumerated both the rights and the responsibilities of plaintiff as a civil servant in the federal government as well as that of the federal government. Defendants' actions and inactions were in direct violation of federal and agency personnel laws, rules, regulations, and guidelines under which plaintiff was employed. The federal and agency personnel laws, rules, regulations, and guidelines were designed to protect and guarantee the plaintiff, as a federal government employee, a workplace free of discrimination and retaliatory actions. Plaintiff relied upon the expressed and implied employment contractual obligations contained in these laws, rules, regulations, and statutes. Defendants actions were in breach of these contractual obligations."

- Talk about deliberately false and misleading statements and misrepresentation and deceit on the part of the district court judge, whose entire case is dependent on the Appellate Court being too lazy to even read that which plaintiff is presently writing and to actually verify the facts to see that it is plaintiff who is telling the truth and that it is the district court judge who is making false and misleading statements, just as much as it is defendants who are engaging in false statements under oath.

The Court even goes so far as to try to

distort the actual written holding of *Adarand* to suit its own purposes:

"Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to Adarand. We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal footing." *General Contractors v. Jacksonville*, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at ---, 113 S.Ct., at 2303. (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2104-2106.)

"Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2110-

2112.)

"The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race -- a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," *Hirabayashi*, supra at 100, 63 S.Ct. at 1385 -- should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.*, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. **Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling**

governmental interests."(*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114.)

V National Origin Discrimination

If it is true that "nowhere does the record indicate the national origin of any person accepted for job vacancies, management programs, or the like", that is true it is only because the district court judge himself has totally incorrectly ignored plaintiff's Rule 56 (f) affidavit since "the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition", since all of the evidence was in the possession of defendants, and since defendants themselves purposefully refused to conduct the mandatory independent investigations according to 29 C.F.R. § 1614.

The reality of the matter however is that there is direct and indirect evidence of the claim of national origin. Actually plaintiff has an entire section in his pleading as well as in his declarations devoted specifically to the Office of Personnel Management classification of minorities by race and national origin under the Federal Equal Opportunity Recruitment Program, with all of the preferences in **selection** and **hiring** under FEORP being determined by such classification of minorities by race and national origin, and which very definition of minority itself specifically includes everyone from every

continent, except people of European ancestry, such as Hungarians, and which plaintiff therefore maintains are discriminatory and unconstitutional.

"OPM guidelines define minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of Europe. See Attachment 1 to FPM Letter 720-2.

Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows: "(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. (b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that "in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language". The FPM Letter provides no basis for its varying definition of Hispanic origin within the 50 states.

VI Age Discrimination

The Court states the appropriate inquiry in age discrimination is that "1) That he is a member of a protected group; 2) That he has suffered unfavorable employment action taken by his employer; and 3) That age was "a determining factor" in the employer's decision." The Court grants plaintiff that he is a member of a protected group of persons over 40 years of age and that plaintiff suffered unfavorable employment action taken by his employer.

If it is true that plaintiff "has failed to plead any facts showing that his age had anything to do with his nonselection", even though the record is filled with job vacancy announcements for which plaintiff applied and

in which much less qualified applicants under the age of 40 were selected, that is true only because the district court judge himself has totally incorrectly ignored plaintiff's Rule 56 (f) affidavit since "the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition", since all of the evidence was in the possession of defendants, and since defendants themselves purposefully refused to conduct the mandatory independent investigations according to 29 C.F.R. § 1614.

Actually plaintiff has an entire section in his pleading as well as in his declarations devoted specifically to the issue of how the exclusion of relevant qualifications from even consideration for Federal Equal Opportunity Recruitment Program designated job openings is discriminatory. The reality of the matter is that the rating criteria for job vacancies upon which selection is supposed to made purposefully excludes from consideration relevant qualifications and merit, especially relevant experience, of which older persons have more, precisely just so that younger and correspondingly much less experienced persons can nevertheless be selected and hired over much older and correspondingly much more experienced persons. Plaintiff has repeatedly expounded upon this simple fundamental fact of reality, and has even pointed to the fact that in several interviews that plaintiff was specifically referred to as being

"overqualified", upon which there are cases equating such comments to age discrimination in and of itself. ...

"Under sections entitled "MINIMUM QUALIFICATION REQUIREMENTS" dealing with the Career Opportunities Training Agreement (COTA), which is an affirmative action program for minorities and women and hispanics, job vacancy announcements typically state that "Through use of the Department of Health and Human Services (DHHS) Career Opportunities Training Agreement (COTA), DHHS employees who do not meet the basic qualification requirements as found in the Qualifications Standards Handbook, will be given the opportunity to be competitively selected and trained for the position. Applicants who are currently at the GS-5 or GS-6 level will be placed in a GS-5 "trainee" position; applicants who are currently at the GS-7 or GS-8 level will be placed in a GS-7 "trainee" position; and applicants who are currently GS-9 and above will be placed in a GS-9 "trainee" position"." ...

Thus older highly experienced and qualified persons are not selected or hired, and instead younger totally unqualified persons are in fact selected and hired and promoted. Thus the district court is incorrect that FEORP and AEP "at most speak to minorities and women, not people under age

40", for in fact many of the FEORP and AEP programs, such as "STRIDE, START, ACCESS, and COTA", are specifically aimed at giving preferences and favoritism to people under age 40 in the lower GS grade levels, for by age 40 minorities and women and white males hopefully are qualified for something. ...

VII Retaliation

The Court states the elements of a claim of retaliation are that "1) He engaged in a protective activity; 2) The employer took adverse employment action against him; and 3) A causal connection existed between the protected activity and the adverse action". Actually an alternative third element of a prima facie case of retaliation is that "3) the adverse action followed within a relatively short time thereafter".

The District Court then goes off on a tangent. Supposedly since "Lukacs was consistently promoted after filing EEO complaints", totally ignoring that plaintiff was only promoted in non FEORP designated and non AEP designated and non affirmative action designated and non diversity designated job openings and that he was consistently and constantly being denied selection and promotion in FEORP designated and AEP designated and affirmative action designated and diversity designated job openings, (See Exhibit "19". See Exhibit "20". See Exhibit

"21". See Exhibit "22". See Exhibit "23". See Exhibit "24".), there can be no other forms of retaliation. Thus the district court can now supposedly totally ignore about two dozen of plaintiff's EEO complaints dealing with various forms of retaliation. (See Exhibit "10".) Supposedly for "the two job vacancies that were never filled", which by the way they were, in fact one of the two job vacancies were filled by two totally unqualified so called "trainees", (See Exhibit "17".), even though plaintiff was not selected, that nonselection is supposedly not an "adverse employment action". By the district court's reasoning, only if a job vacancy is filled is there an "adverse employment action". What the court ignores is the fact that it is plaintiff's "nonselection" which is the "adverse employment action", for plaintiff is not selected whether or not someone else is selected. For "the two positions that were filled", as plaintiff has adequately explained above, it is not true that "the persons selected were more qualified than he".

Rather strangely enough, with the rather loud silence being an admission in itself, the district court chooses to totally ignore the twelve minorities and females chosen for the NIH Management Cadre Program. Nowhere in the opinion does the district court ever even come close to intimating that "the persons selected were more qualified than he", for in fact

plaintiff was, even by grade level alone, much more qualified than any of the twelve minorities and females chosen for the NIH Management Cadre Program. In addition, one of the four minority and female (with there being no white male) members, which is an element of the NIH FEORP and AEP affirmative action programs, of the NCI Qualifications Review Board who recommended the NCI selections to none other than the NCI FEORP Target Manager or NCI "responsible FEORP official", was none other than the black female selecting official of several job vacancies on which plaintiff had timely filed EEO complaints, including job vacancy announcemets CA-91-0014 and CA-91-0159.

VII Hostile Work Environment

The district court, supposedly based "upon consideration of the pleadings and the record herein", fails to find any sort of hostility for which the law provides redress. Perhaps the district court simply did not even bother to look, or purposefully chose not to even read that which it saw. (See Exhibit "10".) In addition, the district court claims that "as Defendant points out, Lukacs has failed to exhaust his administrative remedies before bringing a claim for hostile work environment", but the reality of the matter is that the declaration of Defendant upon which the district court relies which so

authoritatively states that plaintiff has never even filed a claim for hostile work environment is nothing less than **perjury**, for the same office totally contradicts that **"false statement under oath"**. (See Exhibit "36".)

IX Breach of Employment Contract

Regarding federal employees, the District Court itself quotes that "Absent specific legislation" there is no breach of an implied employment contract. But in this case, even by the district court's reasoning, there is "specific legislation", and thus there is an implied employment contract, and defendants have breached that "specific legislation". Not only that the district court itself on pages 10 and 11 even quotes a part of that "specific legislation" in the form of the Public Health Service Federal Personnel Manual Instructions, which "specific legislation" has been breached by defendants. The district court can't have it both ways. Moreover Title VII as the court points out is merely "for the redress of federal employment discrimination", and not for breach of contract, and certainly not for constitutional violations for a mere law cannot take precedence over the constitution itself. ...

X 29 C.F.R. 1614 Processing and Investigation

The district court cites one irrelevant case supposedly standing for the proposition that "there is no separately recognized cause of action for failure to timely process an EEO complaint".

Plaintiff-appellant has repeatedly stated:

"Basically, among other things, Plaintiff claims that as a federal government employee that Plaintiff had a right to have 29 C.F.R. § 1614, which became effective on October 1, 1992, followed as an element of Plaintiff's "compensation, terms, conditions, or privileges of employment", without discrimination. ...

"Here there is not only a total failure not only to not just timely process an EEO complaint, but in fact a total failure to process several EEO complaints at all, and in addition there is a total failure to conduct several mandatory independent investigations for several years. Thus this case is distinguishable, for this is not just untimely processing, but a total lack of any processing at all, for in effect five years, **simply because these were EEO complaints by a white male against affirmative action for minorities and women, and especially when at the same time other EEO complaints by minorities and females were being actively processed and**

aggressively investigated. (See Declaration of Frank Paul Lukacs.)

Plaintiff maintains that the purposeful and intentional total lack of any processing or investigation of his EEO complaints does give rise to a Title VII claim, for it is obvious that **Plaintiff's EEO complaints being from a white male against affirmative action were purposefully being "delayed" or simply intentionally not being independently investigated or processed for years and years and years and years and years precisely because they were EEO complaints from a white male against affirmative action, while at the same time other EEO complaints during those same five years were being actively and aggressively processed and actively and aggressively investigated simply because these EEO complaints were from minorities or females and hispanics."**

"The reality of the situation is that a benefit is being conferred by the government upon federal government employees who are minorities and women and hispanics and asians, but that same benefit is being denied by the government to federal government employees who are white males. In this there is supposedly no harm. Complainant maintains that the amount of the benefit being given to minorities and women and hispanics and asians and at the same time being denied to white

males is precisely the amount of the loss and harm and injury. Furthermore, if the benefit that is conferred upon minorities and women and hispanics and asians is regarded as a term, privilege, or condition of employment, for that is the precisely the way that the benefit was conferred initially, then the denial of that same benefit to white males is most certainly to be regarded as a term, privilege, or condition of employment."

DECLARATION OF FRANK PAUL LUKACS PLAINTIFF PRO SE

I Frank Paul Lukacs being duly sworn in accordance with law do hereby state and depose the following:

1. I have personal knowledge of the facts contained in this declaration which are true and correct to the best of my knowledge, information, and belief.

2. EXHIBIT "1" is a true and exact copy of an original of a typical "Order to Proceed on Informal Briefs" pursuant to local rule 34(b) from the United States Court of Appeals for the Fourth Circuit which basically states that "whenever any pro se appeal is filed, the clerk shall notify the appellant that appellant shall file, within twenty one days after receipt of such notice, an informal brief, listing the specific issues and supporting facts and argument raised on appeal".

3. EXHIBIT "2" is a true and exact copy of the original rating criteria upon which selection is supposed to be made for CA-91-0014 and CA-91-0159 demonstrating that the rating did not give any credit at all for any of my relevant formal undergraduate, graduate, or professional education.

4. EXHIBIT "3 is a true and exact copy of the original rating criteria upon which selection is supposed to be made and demonstrates the actual rating criteria used

for the GS-1102-11 under OD-90-0395 of my first and second EEO complaints when I applied as a GS-11 and which gave me no credit for any of my relevant formal undergraduate, graduate, or professional education.

5. EXHIBIT "4" is a true and exact copy of the original rating criteria upon which selection is supposed to be made and demonstrates the actual rating criteria used for the GS-1102-12 under OD-91-0063 when I applied as a GS-12 and which gave me no credit for any of my relevant formal undergraduate, graduate, or professional education.

6. EXHIBIT "5" is a true and exact copy of the original NCI job vacancy announcement for a GS-1102-09/11/12 contract specialist which has a basic requirement for GS-09 through GS-12 of either "(A). A 4 year course of study leading to a bachelor's degree with a major in any field. OR (B) At least 27 semester hours in any combination of the following fields: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management."

7. EXHIBIT "6" is a true and exact copy of the original so called Rule 12 Rule 56 letter which was sent to me as plaintiff pro se on 08/19/97 in PJM-97-379.

8. EXHIBIT "7" is a true and exact copy of the original so called Rule 12 Rule 56 letter which was sent to me as plaintiff pro

se on 01/16/98 in PJM-97-3359, and on 02/20/98 in PJM-97-3359, and on 08/11/98 in PJM-97-3359.

9. EXHIBIT "8" is a true and exact copy of the original so called Rule 12 Rule 56 letter which was sent to me as plaintiff pro se on 02/19/98 in PJM-97-3483, and on 08/24/98 in PJM-97-3483.

10. EXHIBIT "9" is a true and exact copy of the original so called Rule 12 Rule 56 letter which was sent to me as plaintiff pro se on 01/16/98 in PJM-97-3495, and on 05/054/98 in PJM-97-34953.

11. EXHIBIT "10" is a true and exact copy of the original statement of facts of my four dozen separate and distinct individual Equal Employment Opportunity complaints.

12. EXHIBIT "11" is a true and exact copy of the original memorandum and order of the court dated 01/25/99 and entered on 01/28/99 stating that supposedly the contents of Exhibit "10" above "could have been fully raised in the earlier litigation", but which statement of facts it is the district court judge himself who simply refused to consider.

13. EXHIBIT "12" is a true and exact copy of the original letter from the Equal Employment Opportunity Commission dated 11/13/96 (with the complaint of federal court civil action PJM-96-2913 having been filed on 09/17/96), acknowledging receipt of the appeal on NIH-344-91 and NIH-120-92 which dealt with my first four EEO complaints, which included

among other things in particular job vacancy announcements CA-91-0014 and OD-91-0063, which basically means that according to the relevant rules and regulations regarding the filing of a civil action in an appropriate federal court I could not have included the facts of CA-91-0014 and OD-91-0063 in PJM-96-2913.

14. EXHIBIT "13" is a true and exact copy of the original of the November 26, 1991 letter of the black female selecting official Beverly Lott Wyatt, listing her supposedly top five candidates interviewed for CA-91-0159 with only the first initial and the last name of her top five candidates, the Qualifications Review Board memos listing the full first name and the full last name, from which lists the full first name of the supposedly top five candidates of Beverly Lott Wyatt on job vacancy announcement CA-91-0159 can be ascertained to be that of five females, indicating that Katherine Kellington GS-11 was selected and offered the position, and stating that the selecting official was "unable to make a selection from this certificate and ask that it be canceled and the vacancy re-advertised".

15. EXHIBIT "14" is a true and exact copy of an original of the "FEORP Implementation Diagram Competitive Process" demonstrating that the normal recruitment and selection procedures are not followed in affirmative action Federal Equal Opportunity Recruitment Program (FEORP) designated job

vacancy announcements intended for minorities and women and hispanics.

16. EXHIBIT "15" is a true and exact copy of an original of the "Justification for the Selection of a Non-Minority Candidate for a Federal Equal Opportunity Recruitment Program (FEORP)", which justification and approval is only required when the most highly qualified white male is selected, but not when any minimally qualified or even totally unqualified minority or female or hispanic is selected.

17. EXHIBIT "16" is a true and exact copy of an original of the "FEORP Target Series Merit Promotion Documentation" which has to be filled out by the selecting official and which specifically states that "As you interview the Best Qualified candidates on the attached certificate, it will be necessary for you to gather information on their minority and handicapped status. Please fill out the form and return it to the Personnel Office with the Merit Promotion Certificate. Of those on the certificate, how many were male or female, disability male or female, minority group male or female, non-minority male or female, black male or female, hispanic male or female, American Indian male or female, and Asian / Pacific Island male or female. Please indicate the race and sex of your selectee. Please return this information in an envelope marked "Confidential". "

17. EXHIBIT "17" is a true and exact

copy of the original of the letter of July 21, 1992 in which Mr. David Snight, the selecting official for job vacancy announcement OD-91-0162, states that he did in fact hire "two trainees" "under a concurrent vacancy announcement" rather than hire me under job vacancy announcement OD-91-0162.

19. EXHIBIT "18" is a true and exact copy of the original and is the job vacancy announcement for up to four (4) positions as a management intern which demonstrates the relationship, connection, and nexus between an advertised "position" such as the management intern program, on which affirmative action program I have in the past filed a separate and distinct EEO complaint, in which the most highly qualified person is supposed to be chosen, and the Career Opportunities Training Agreement "COTA" in which a totally unqualified or a minimally qualified minority or female or hispanic "trainee" can be selected instead of the most highly qualified white male such as myself.

20. EXHIBIT "19" is a true and exact copy of an original and it lists the occupations targeted as underrepresented by FEORP and shows that GS-1102 Contract Specialist Positions at the National Institutes of Health, NIH, but not Patent Advisor positions at NIH, were FEORP designated.

21. EXHIBIT "20" is a true and exact

copy of an original and it lists the mission oriented populous occupations at NIH and shows that GS-1102 Contract Specialist Positions at the National Institutes of Health, NIH, but not Patent Advisor positions at NIH, were regarded as mission oriented populous occupations.

22. EXHIBIT "21" is a true and exact copy of an original and it lists the NCI FEORP occupations and shows that GS-1102 Contract Specialist positions at the National Cancer Institute, "NCI", but not Patent Advisor Positions at NCI, were FEORP designated.

23. EXHIBIT "22" is a true and exact copy of the original and is a copy of the cover page of a typical NIH Vacancies which is dated July 13, 1992 which was used on every job vacancy announcement throughout all the years that I worked in NIH, and it states that "Under the Affirmative Employment Program, minorities, women, and persons with disabilities have been found to be underrepresented in the following GS series: 201, 334, 341, 343, 401, 403, 404, 601, 610, 644, 1101, 1102, 1320, 1410, and 1412. Individuals who are members of these groups and meet the eligibility criteria are encouraged to apply. Relocation expenses may be paid for authorized target group candidates selected from outside the commuting area.".

24. EXHIBIT "23" is a true and exact copy of the original and is the front page of NIH Vacancies dated September 25, 1995 and it

also states the same thing in that "Under the Affirmative Employment Program, minorities, women, and persons with disabilities have been found to be underrepresented in the following GS series: 201, 334, 341, 343, 401, 403, 404, 601, 610, 644, 1101, 1102, 1320, 1410, and 1412. Individuals who are members of these groups and meet the eligibility criteria are encouraged to apply. Relocation expenses may be paid for authorized target group candidates selected from outside the commuting area.".

25. EXHIBIT "24" is a true and exact copy of the original and includes relevant information and misinformation from the National Institutes of Health (NIH) Affirmative Employment Program (AEP) Plan for Minorities and Women, especially regarding the very definition of supposed "underrepresentation".

26. EXHIBIT "25" is a true and exact copy of the original of the memorandum opinion and order of the district dated June 30, 1997 directing the parties to file no further motions.

27. EXHIBIT "26" is a true and exact copy of the original of the memorandum opinion and order of the district dated July 23, 1997 again directing the parties to file no further motions.

28. EXHIBIT "27" is a true and exact copy of the original of the memorandum opinion and order of the district dated October 13, 1998 directing the parties to file no further

motions or pleadings and that "The Court will not consider docketed Papers 70, 71, 72, 74, 75, and 86".

29. EXHIBIT "28" is a true and exact copy of the original of several statutes and regulations involved in this case.

30. EXHIBIT "29" is a true and exact copy of the original of
the declaration of the selecting official of CA-91-0014.

31. EXHIBIT "30" is a true and exact copy of the original letter of the Director of DHHS Equal Employment Opportunity dated August 25, 1992 to the EEOC regarding several contract specialist job vacancy announcements and stating that I "was determined to be among the best qualified applicants for each position".

32. EXHIBIT "31" is a true and exact copy of the original Department of Health and Human Services Procurement Certificate certifying that Frank P. Lukacs has met all of the qualifications and is hereby designated as a Level II Contracts Official.

33. EXHIBIT "32" is a true and exact copy of an original vacancy announcement and demonstrates the duties of a typical clerk in the federal government.

34. Exhibit "33" is a true and exact copy of an original showing the names of the sixty two supposedly best qualified candidates for contract specialist job vacancy announcement CA-91-0014 who were forwarded to

the selecting official.

35. Exhibit "34" is a true and exact copy of an original showing the names of the sixty nine supposedly best qualified candidates for contract specialist job vacancy announcement OD-91-0063 who were forwarded to the selecting official.

36. EXHIBIT "35" is a true and exact copy of the original job vacancy announcement for OD-91-0063 and which specifically advertises for "5 jobs".

37. EXHIBIT "36" is a true and exact copy of the original letter of February 06, 1997, one of many similar ones, from the NIH Office of Equal Opportunity accepting allegations of a hostile work environment for processing according to Title 29 Code of Federal Regulations (CFR) Section 1614 which became effective October 1, 1992.

38. EXHIBIT "37" is a true and exact copy of the original of the October 25, 1994 NIH publication "THE RECORD" showing that those actually selected for the management cadre program were ten females and two minority males.

39. EXHIBIT "38" is a true and exact copy of an original that was given to me by the NIH OEO of a sample justification and approval that is required in a justification for "an exception to FEORP", since the person proposed for selection in this exhibit which was contained in the informal investigation of Plaintiff's fourth, fifth, and eight EEO

complaints, "is not a minority", and of the requirements for the concurrence and approval necessary and required in any justification for selection of the most qualified white male but which is not required for the selection of even a minimally qualified minority or female or hispanic.

40. 28 U.S.C.A. § 1746 Unsworn declarations under penalty of perjury states that "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: (1) If executed without the United States: "I declare (or certify, verify, or state), under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)". (2) If executed within the

United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)"."

I, Frank Paul Lukacs, certify that all of the attached exhibits are true and exact copies of the originals.

I, Frank Paul Lukacs, declare or certify or verify or state under penalty of perjury that the foregoing is true and correct.
Executed on February 18, 1999.

_____

Frank Paul Lukacs
February 18, 1999
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX AAA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*
Plaintiff	*Civil Action No.
v.	*
	*PJM 96-2913
DONNA E. SHALALA, et al.	*
Defendants	*

* * * * * * * * * * * * * * *

OPINION

Pro Se Plaintiff Frank Paul Lukacs sues Department of Health and Human Services (DHHS) Secretary Donna E. Shalala and various employees at the National Institutes of Health ("NIH"), alleging discrimination in employment based on race, sex, national origin, and age pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq. and the Age Discrimination and Employment Act of 1967 (ADEA), that 29 U.S.C.A. § 621 et seq. Among other things, Lukacs argues certain hiring programs at NIH violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. He further alleges he was retaliated against for filing his Title VII claims and adds a count for breach of contract.

Defendants have filed a Motion to Dismiss or in the Alternative for Summary Judgment. Upon consideration of the pleadings and the record herein, the Court has determined to GRANT Defendants' Motion to Dismiss as to certain claims and GRANT their Motion for Summary Judgment as to all others. Since nothing remains of the case, it will accordingly be CLOSED.

I.

Lukacs is a white male of Hungarian descent over the age of 47. During all relevant times, he was employed by NIH in the National Cancer Institute (NCI). He began in March, 1990 as a GS-11 contract specialist in the Office of Administration. In April 1991 he was promoted to a GS-12. In July 1991 he applied and was selected for the position of GS-12 Patent Advisor. In August 1993, he was promoted to GS-14 Technical [sic] Development and Patent Specialist. Lukacs resigned from NCI effective October 21, 1995.

During the time he applied and was selected for the indicated positions at NCI, Lukacs also applied for a number of jobs for which he was not selected. Among these were:

a) Vacancy Announcement CA-91-0014 (Contract Specialist), which Lukacs applied for in early 1991 but which was filled by a 33-year old African American female;

b) Vacancy Announcement OD-91-0063 (Contract Specialist), which he applied for in the Spring of 1991 but which was filled by a

white female;

c) Vacancy Announcement CA-91-0159 (Contract Specialist), which he applied for in the Fall of 1992 but which was canceled and for which no one was hired; and

d) Vacancy Announcement OD-91-0162 (Contract Specialist), another position he applied for but which was never filled.

In the Spring of 1994, Lukacs also applied for but was not selected to participate in the NIH Management Cadre Program which is intended to provide "a combination of on-the-job training, academic courses, and selected short-term assignments to prepare individuals to compete for advancement and/or career change to leadership positions which are primarily administrative or managerial."

In response to these events, Lukacs initiated what eventually totaled in excess of 50 EEO complaints in which he contended, among other things, that he had been discriminated against on the basis of race, sex, national origin, and age and that he had moreover been retaliated against for having made these claims. Before the Court, Lukacs contends that some of the advertised positions for which he was not selected were illegally set aside for minorities and women under the Federal Equal Opportunity Recruitment Program (FEORP) and the Affirmative Employment Program (ADP) [sic].[1]

([1] Lukacs challenged these programs

throughout his 84-page complaint and apparently intends that his challenge be read into each of the six counts he has sued upon. Defendants have attempted to answer not only this challenge but various other arguments Lukacs may at one time or another have raised in the course of his 50 or more complaints, though the arguments are somewhat difficult to locate in the Complaint itself. One of Lukacs' quarrels appears to be with NIH's Relocation Reimbursement Policy which he says in effect reimburses only minorities and women, not males. As with all of Lukacs' claims, this one is met and dispatched quickly. According to NIH's supervisory management specialist, pursuant to the policy in question the decision to reimburse new appointees is made prior to advertising a vacancy and is based only on the nature of the position and the expected difficulty of recruiting qualified applicants. Race, gender, sex, national origin, and age never enter into the equation. Lukacs cannot rebut this statement and his claim accordingly falls.)

II.

A) In considering a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), a court reviews the complaint in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). "[A] complaint should not be dismissed for failure to state a claim unless

it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). However, "when the factual allegations are 'functionally illegible' or 'badly conclusory' ... [they] should ... not be accepted as true and the claim dismissed." Scannell v. Bell Air Police Dep't., 968 F.Supp. 1059, 1062 (D.M.d. 1997) (citing Shuster v. Oppelman, 962 F.Supp. 394, 395 (S.D.N.Y. 1997)).

B. A party moving for summary judgment must demonstrate that the non-moving party lacks evidence to support his case. Fed. R. Civ. P. 56; Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). Although the non-moving party may rebut this by showing specific facts demonstrating the existence of a genuine issue for trial, he must do so by presenting "some concrete evidence" beyond mere allegations which tend to prove his claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The non-movant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985).[2]

([2] Generally speaking, pro se litigants are held to less stringent standards than trained attorneys when preparing and filing their pleadings. Haines v. Kener, 404 U.S.

519 (1972). While the court should not defeat a pro se litigant's claims because of technical deficiencies, if the pro se litigant does not have a meritorious claim to begin with, dismissal is appropriate. Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978). Pro se Plaintiff in this case merits no special solicitude. While technically pro se, he often reminds the Court in his pleadings that he in fact possesses a juris doctor degree.)

III.

Preliminarily, the Court addresses the question of who is properly suable as a defendant in this case. Lukacs argues that federal employees may sue their employers for "constitutional violations against which Title VII provides no protection at all," citing Holloway v. Bentsen, 870 F. Supp. 898, 902 (N.D. Ind. 1994). However, except for his claim for breach of contract,[3] all of Lukacs' claims are comprehended by Title VII and the ADA, as to which the only proper defendant is "the head of the department, agency, or unit." ([3] The breach of contract claim is addressed in Part IX hereof.) 42 U.S.C. § 2000e-16(c). See generally Williams v. The Virginia National Guard, 914 F.2d 250 (4th Cir. 1990); Williams v. United States General Services Admin., 905 F.2d 308, 311 (9th Cir. 1990); Mahoney v. United States Postal Service, 884 F.2d 1194, 1196 (9th Cir. 1989). The Court, then holds that the only proper Defendant as to all counts in this case is DHHS Secretary

Shalala and no one else. All counts against all other Defendants will be DISMISSED.[4]

([4] Hereafter the term "Defendant will refer only to Defendant Shalala.)

IV.

A) In Count I, Lukacs alleges that he was discriminated against on the basis of race and gender in violation of 42 U.S.C. § 2000 et seq.

In order to sustain a claim of race or sex discrimination, a plaintiff must demonstrate either direct discrimination, see Transworld Airlines Inc. v. Thurston, 469 U.S. 111 (1985), or indirect discrimination as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Beyond his mere say-so, which essentially counts for naught, see Goldbert v. B. Green and Co., Inc., 836 F.2d 845, 848 (4th Cir. 1988), Lukacs pleads no direct discrimination regarding race or gender. He is left, therefore, under McDonnell Douglas, to assert a discrimination claim by pleading that:

1) He is a member of a protected class;

2) His employer did not promote him to a given position;

3) The employer placed someone else in the position outside the protected group; and

4) That he was qualified for the position.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994).

Assuming Lukacs can make out a prima facie case as to discrimination, Defendant may still demonstrate a legitimate non-discriminatory reason for his non-selection, after which any presumption of discrimination would drop out of the case and Lukacs would be obliged to establish that the asserted reason was in fact a pretext for illicit discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993); Ennis v. National Ass'n of Business and Educational Radio, Inc., 53 F.3d 55, 57-58 (4th Cir. 1995).

B) As to two of the job vacancies Lukacs was not selected for, his claims are easily disposed of. Job vacancies CA-91-0159 and CA-91-0162 were canceled and no one of any category was selected in his place. Lukacs cannot, therefore, make out a prima facie case for discrimination, i.e., he is unable to show that he suffered an adverse employment action. See Young v. Lehman, 748 F.2d 194, 198 (4th Cir. 1984), cert. denied, 471 U.S. 1061 (1985); Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981).

Job vacancies CA-91-0014 and CA-91-0163 require somewhat lengthier comment. The former position was filled by an African-American female, the latter by a white female. Presumably Lukacs asserts race and gender bias as to the former, only gender bias as to the latter. The Court will assume, for the sake of argument, that Lukacs has made an

appropriate prima facie showing under McDonnell-Douglas.

As to these positions, however, Defendant has provided a clearly recognized legitimate, non-discriminatory reason for Lukacs non-selection for both positions, viz., that the persons selected over Lukacs were in fact better qualified than he. See Gairola v. Com. of Va. Dept. of General Services, 753 F.2d 1281, 1287 (4th Cir. 1985); Young v. Lehman, 748 F.2d at 198.

Thus, as to Vacancy Announcement CA-91-0014, a contract specialist position filled by a 33-year-old African-American female, Defendant points out that the selectee had over 14 years experience as opposed to more limited experience on the part of Lukacs. Beyond that, Lukacs fails to present any evidence suggesting that the reason asserted by Defendant for the selection of the person was a pretext for discrimination.

With regard to Vacancy No. OD-91-0063, a contract specialist position filled by a white female, Defendant specifically cited Lukacs' "lack of extensive experience" in acquiring automatic data processing as the reason for omitting him from the interview and further selection process. Again Lukacs fails to respond with any evidence indicating pretext.

C. Lukacs does not aid his cause by blanket assertions that various of NIH's hiring policies are discriminatory. He bases his claim that NIH's Management Cadre Program

discriminates by reason of race, age, sex, and national origin, on the fact that of 12 persons selected for the program during the period in question, 10 were women and 2 were minority males [Petitioner's comment: which is another way of admitting that no white males were selected]. While it may be true that the program has a "special emphasis ... directed toward women, minorities, and employees with disabilities" to encourage them to apply for the program, that alone does not make it unconstitutional or a violation of Title VII. So long as minorities and women are not given preferential treatment in the hiring for the position and so long as the positions are not set aside for them, there is no impropriety. See Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.), cert. denied, 510 U.S. 908 (1993); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994); Coral Const. Co., v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). If "[w]hites and men are harmed only by competition from qualified candidates, ... [there] is not an appropriate objection." Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1553 (M.D. Ala. 1995).

In any event, there is no factual support for the claim that Lukacs was discriminated against by the program based on his race, gender, national origin, or age. Four

qualified **applicants** were white; two were males, and three were over age 44. The record is silent as to the national origin of any of the **applicants**. [Emphasis of the district court's very carefully chosen, but in effect very deceptive and misleading, word **applicants**, especially for those reading this quickly who might not notice the difference, has been supplied by Petitioner to prove that the district court merely refers to **applicants**, of which four were white and of which two were males, and not to those actually **selected**, with Petitioner being one of the two white male **applicants** who although deterred by the FEORP designation and the AEP designation which basically said "white males need not even apply for there is no chance of a white male ever being actually selected" applied anyway.]

D) Lukacs says that the Federal Employment Opportunity Recruitment Program (FEORP) and the Affirmative Employment Program (AEP) are unconstitutional because they are "set-aside" programs that cannot pass the test of strict scrutiny. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). But unlike the set-aside programs in Adarand[5] and Croson[6], FEORP and AEP are designed to encourage minorities to apply for vacancies, not programs guaranteeing their hiring. ([5] In Adarand the program at issue was clearly a "set-aside." The program

involved paying prime or general contractors more for subcontracting to small business owned by "socially and economically disadvantaged individuals." Adarand, 505 U.S. at 205-06.) ([6] The program in Croson was also a set-aside. It required prime contractors to subcontract at the least 30% of the dollar amount of the contract to "minority business enterprises." Croson, 488 U.S. at 477.) As the Public Health Service Federal Personnel Manual Instructions states:

> [t]he objective of personnel manuals on merit promotion is to provide a system which will assure that all qualified and available candidates are provided fair and systematic consideration and opportunities for selection for promotion based on merit ... The promotion process must reflect an affirmative posture on equal employment opportunities. Operation of the plan must ensure that the promotion policies and procedures provide for the identification, consideration, and referral of the best qualified candidates from all appropriate sources without discrimination for any nonmerit reason.

As before, the fact that minorities and women are encouraged to apply for certain positions does not violate the Equal Protection Clause of the Fourteenth.

The Court finds no genuine dispute of

material fact and grants the Defendant's Motion for Summary Judgment on Count I.

V.

In Count II Lukacs says he was discriminated against because he is of Hungarian heritage. The Court has scoured the record for direct or indirect evidence of this claim, but apart from Lukacs' own assertion of discrimination -- which is insufficient -- see Goldberg, 836 F.2d at 848, nowhere does the record indicate the national origin of any person accepted for job vacancies, management programs, or the like. In any event, once again there were legitimate non-discriminatory reasons for Lukacs' non-selection for the indicated positions and, as before, there is a total absence of evidence of pretext in the selection process.

Summary judgment is entered for Defendant on Count II.

VI.

In Count III, Lukacs alleges discrimination on the basis of his age. Although he attempts to base this claim on various constitutional and statutory foundations, his claim is only assertable, if at all, under the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621 et seq. Accordingly, in the absence of direct evidence, to properly present an age discrimination claim, a plaintiff must plead:

1) That he is a member of a protected group;

2) That he has suffered unfavorable employment action taken by his employer; and

3) That age was "a determining factor" in the employer's decision. See Proud v. Stone, 945 F.2d 796 (4th Cir. 1991) (citing Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th cir.), cert. denied, 502 U.S. 963 (1991).

Again Lukacs comes up short. Allowing that he was at all relevant times over 40 years of age and assuming he suffered unfavorable employment action, he has failed to plead any facts showing that his age had anything to do with his non-selection. Even were he able to cite age-related epithets by co-workers -- which he does not -- he would still posit no actionable discrimination. See E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992).

To the extent Lukacs means to argue that FEORP and AEP are discriminatory, these programs at most speak to minorities and women, not people under age 40.

The Court will grant Defendant summary judgment as to Count III.

VII.

In Count IV, Lukacs says that employees at NIH retaliated against him because he filed multiple EEO claims. To establish a retaliation claim, a plaintiff must plead that:

1) He engaged in a protective activity;

2) The employer took adverse employment action against him; and

3) A causal connection existed between the protected activity and the adverse action. Carter v. Ball, 33 F.3d at 460.

The record shows that while not selected for certain job vacancies, Lukacs was consistently promoted after filing EEO complaints. He advanced in employment in 1991, the same year he filed two EEO complaints and advanced again in 1992 and 1993. As before, Lukacs can establish no adverse employment action as to the two job vacancies that were never filled. He is also unable to overcome the fact that with regard to the two positions that were filled, the persons selected were more qualified than he. As before, he cannot show that the reasons for the selections were pretextual and that the real reason for his nonselection was discrimination. See Jiminez v. Mary Washington College, 57 F.3d 369, 377-78 (4th Cir.), cert. denied, 116 S. Ct. 380 (1995).

The Court will enter summary judgment against Lukacs as to Count IV.

VII.

In Count V, Lukacs claims he was subject to a hostile work environment but fails to specify any sort of hostility for which the law provides redress. Apart from that, as Defendant points out, Lukacs has failed to exhaust his administrative remedies before bringing a claim for hostile work environment, a mischance fatal to his proceeding in this Court. Davis v. North Carolina Dept. of

Correction, 48 F.3d 134, 136-37 (4th Cir. 1995).

The Court will dismiss Count V.

IX.

In Count VI, Lukacs claims that Defendant breached an implied employment contract, citing Holloway v. Bentson, 870 F.Supp. 898 (N.D.Ind. 1994). However, the rule regarding federal employees is well established. "[A]bsent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather from any contractual or quasi-contractual relationship with the government." Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985); see Plowman v. United States Dept. of the Army, 698 F.Supp. 627, 631 (E.D. Va. 1988) ("NAFI employees, like all other civilian federal employees, serve by employment, not contract"). For this reason, a plaintiff who is a federal employee may not base has [sic] claim arising out of employment on contract law. See Shaw v. United States, 640 F.2d 1254, 1260 (Ct. Cl. 1981). Title VII, moreover, is "an exclusive, preemptive, administrative and judicial scheme for the redress of federal employment discrimination." Brown v. General Services Administration, 425 U.S. 820, 828-29 (1976).

Count VI of the Complaint is dismissed.

X.

Finally, throughout his Complaint, and his and his voluminous pleading but in no

separately designated count, Lukacs has suggested that the EEO office at NIH violated 29 C.F.R. § 1614 by not responding to his complaints of discrimination within certain designated times. This Court has previously held that "there is no separately recognized cause of action for failure to timely process an EEO complaint." Oliveres v. NASA, 934 F.Supp. 698, 704 (D. Md. 1996), aff'd, 114 F.3d 1176 (4th Cir. 1997) (citing Young v. Sullivan, 733 F. Supp. 131 (D.D.C. 1990), aff'd, 946 F.2d 1568 (D.C. Cir. 1991), cert. denied, 503 U.S. 918 (1992).

The Court reaffirms that proposition at this time and dismisses any claim to this effect.

XI.

For the foregoing reasons, the Court will:

1) Dismiss with prejudice all Counts as to all Defendants other than Defendant Shalala;

2) Enter summary judgment in favor of Defendant Shalala as to Counts I, II, III, IV;

3) Dismiss with prejudice Counts V, VI, and any claim of failure to timely process EEO complaints as to Defendant Shalala; and

4) Direct the Clerk to CLOSE this case.

A separate Order implementing this decision will be entered.

Signature of Peter J. Messitte

_____

Peter J. Messitte
United States District Judge

November 12, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*
Plaintiff	*Civil Action No.
v.	*
	*PJM 96-2913
DONNA E. SHALALA, et al.	*
Defendants	*

* * * * * * * * * * * * * * *

FINAL ORDER

Upon consideration of Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, it is for the reasons set forth in the accompanying Opinion, this 12th day of November, 1998, ORDERED that:

1) The motion to dismiss is hereby GRANTED as to all Defendants other than Defendant Shalala and all Counts as to those Defendants are hereby DISMISSED WITH PREJUDICE;

2) The Motion of Defendant Shalala for Summary Judgment is hereby GRANTED as to Counts I, II, III and IV and final judgment is hereby ENTERED in favor of Defendant Shalala and against Plaintiff Lukacs as to these Counts;

3) The Motion of Defendant Shalala to Dismiss is hereby GRANTED as to Counts V, VI,

and any claim for failure to timely process EEO complaints and said Counts and claim are hereby DISMISSED WITH PREJUDICE;

4) All other pending Motions in this proceeding are hereby rendered MOOT; and

5) The Clerk of the Court shall CLOSE this case.

Signature of Peter J. Messitte

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Peter J. Messitte
United States District Judge

APPENDIX BBB

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*04/06/99
FRANK PAUL LUKACS	*
- Plaintiff	*USCAFC Docket #
v.	*99-1334
DONNA E. SHALALA, et al.	*
Defendants	*D. Maryland #
* * * * * * * * * * * * * * *	*CA-98-4133-PJM

PLAINTIFF-APPELLANT'S INFORMAL BRIEF
PURSUANT TO LOCAL RULE 34 (B)

...With the foregoing issues in mind, which is what plaintiff-appellant's civil actions are really all about, does it even have any semblance of the appearance of impartiality for a district court judge appointed by a President who is the most vocal supporter of so called affirmative action and diversity programs for minorities and females and hispanics to have basically taken over the representation of the case from the Department of Justice via its sua sponte memorandums and opinions, whose contents have not even been remotely intimated or suggested much less actually been proposed by the supposed representatives of defendants the Department of Justice?

Does it even have the appearance of

fairness, much less being an abuse of discretion, for a district court judge to first order that neither party shall file any motions or pleadings, not even to **"amend the party's pleading once as a matter of course at any time before a responsive pleading is served"**, and that the clerk not docket any such motions or pleadings, and therefore that the issues and claims which are contained in plaintiff's proposed amended **verified pleadings** which are either physically returned to plaintiff without even being docketed or else are specifically in writing by the district court judge rather contemptuously not even considered, and which issues and claims therefore are not even permitted to be raised by plaintiff under threat of sanctions, and then for the district court judge to later turn around and nevertheless rather hypocritically state that these same issues and claims "could have been fully raised in the earlier litigation", especially when it was the district court judge who specifically refused to even allow plaintiff the opportunity to even minimally much less fully raise the issues and claims in the earlier litigation, much less actually consider them in the earlier litigation?

Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, does a district court have the power to prevent a

party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure, or dismissing and refusing to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP, and then thereafter having the audacity to conclude that although plaintiff was never even permitted to file pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure containing and raising issues and claims, that these issues and claims which were therefore not raised or considered because of memorandums and orders of the district court that they could not be raised under the threat of sanctions and which would not be considered even if filed, and which issues and claims would have been raised and contained in the prohibited pleadings, motions, affidavits, or appeals authorized by the FRCP, and which should have been considered by the district court, could nevertheless somehow or other supposedly "have been fully raised in the earlier litigation"?

Should the appellate court remand with instructions to the district court to consolidate Plaintiff-Appellant's six federal court cases, PJM-96-2913, PJM-97-379, PJM-97-3359, PJM-97-3483, PJM-97-3495, and PJM-98-4133 according to Federal Rules of Civil Procedure Rule 42 Consolidation since these five federal court cases are **"actions**

involving a common question of law or fact pending before the same court"?

Must the parties have reasonable notice and opportunity to be heard before the sua sponte application of claim preclusion by the district court?

Will issue preclusion or claim preclusion be applied against a party if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the issue or claim in the prior proceeding?

Does a continuing series of wrongful acts resulting in ongoing damage to the plaintiff permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine?

SUPPORTING FACTS AND ARGUMENT FOR ISSUES

I. PJM-97-379, PJM-97-3359, PJM-97-3495

Plaintiff-Appellant Pro Se, following the very specific directions and instructions of Defendants and the Equal Employment Opportunity Commission to file a civil action within 90 days of an agency or EEOC final decision, filed five civil actions PJM-96-2913, PJM-97-379, PJM-97-3359, PJM-97-3483, and PJM-97-3495, representing about five dozen separate and distinct Equal Employment

Opportunity complaints which were timely filed over the course of about five years, and all timely filed either within initially 30 or later 45 days of a discriminatory event as per the relevant rules and regulations. ...

The district court, not knowing much less caring about the fact that Plaintiff-Appellant was following the specific written instructions and directions of the agency and the EEOC as contained in their final decisions, sua sponte dismissed civil actions PJM-97-379, PJM-97-3359, and PJM-97-3495 because they were supposedly "duplicative of claims set forth by Pro Se Plaintiff Lukacs in two other cases before this Court, Civil Action No. PJM-96-2913 and Civil Action No. PJM-97-3483", even though according to 29 C.F.R. § 1614 Plaintiff-Appellant had to have filed the original complaints and their amended complaints as they were filed chronologically and that according to 29 C.F.R. § 1614 Plaintiff-Appellant could not have filed all five of the civil actions at the same time. ...

Outside of the fact that according to the relevant case law that instead of having dismissed PJM-97-379, PJM-97-3359, and PJM-97-3495 that the district court should have instead **consolidated** PJM-97-379, PJM-97-3359, and PJM-97-3495, with PJM-96-2913 and PJM-97-3483, the reality of the matter is that because of the district court action itself, especially due to the fact that there had been

no final decision on the merits, PJM-97-379, PJM-97-3359, or PJM-97-3495 cannot possibly be used for either claim preclusion or issue preclusion purposes. If PJM-97-379, PJM-97-3359, or PJM-97-3495 could have been used for claim preclusion or issue preclusion purposes, then of course the logical consequence of that would be that the district having dismissed PJM-97-379, PJM-97-3359, and PJM-97-3495 supposedly because they were "duplicative of claims" could then easily have turned around and used claim preclusion and issue preclusion against PJM-96-2913 and PJM-97-3483. Since PJM-97-379, PJM-97-3359, and PJM-97-3495 could not be used for claim preclusion or issue preclusion purposes against PJM-96-2913 or PJM-97-3483, then of course it follows naturally that PJM-97-379, PJM-97-3359, and PJM-3495 can not possibly be used for claim preclusion or issue preclusion purposes against PJM-98-4133.

II. PJM-97-3483

Plaintiff-Appellant attempted to amend his complaint in PJM-97-3483, which at the time included only about a dozen of plaintiff-appellant's EEO complaints, with a **verified pleading**, which except for the parties, was the exact same complaint which was filed in PJM-98-4133, and which would therefore contain about four dozen of plaintiff-appellant's EEO complaints. ...

Unfortunately, Plaintiff-Appellant's "Motion for Leave to File an Amended Complaint" in PJM-97-3483 dated September 08, 1998, "Memorandum in Support of Plaintiff's Motion for Leave to File an Amended Complaint" in PJM-97-3483 dated September 08, 1998, and "Amended Complaint" in PJM-97-3483 filed on September 15, 1998 were not even allowed to be docketed by the district court judge, and in fact were physically returned to plaintiff-appellant with the notation that "Pursuant to the verbage in attached Memorandum Opinion and Order (signed by Judge Peter J. Messitte, dated September 8, 1998), no further pleadings are to be filed", with the exact wording of the order of the district court judge rather coincidentally being dated September 08, 1998 but rather coincidentally not being filed until September 15, 1998, being that "neither party shall file further pleadings in this Court". ...

Thus, the district court judge simply refused to even have docketed much less consider the contents of plaintiff-appellant's amended **verified pleading** in PJM-97-3483, which except for the parties, was the exact same complaint which was filed in PJM-98-4133. It is simply non sequitur, not to mention totally unfair, that the contents of the amended complaint which the district court judge simply refused to even allow be docketed much less actually consider should now be used for the purposes of claim preclusion or issue

preclusion. That scenario makes no sense whatsoever. To first not even allow the contents of the amended complaint to be docketed and then to turn around and state that the contents of that amended complaint which was not even allowed to be docketed much less actually considered, can nevertheless be used for the purposes of claim preclusion or issue preclusion is totally absurd. To state that the claims and issues "could have been fully raised in the earlier litigation" is totally contradicted by the district court's own actions in refusing to even allow the contents of the amended complaint to be docketed much less actually consider the contents of the amended complaint. ...

Plaintiff-Appellant in PJM-97-3483 on October 07, 1998 filed a "Notice of Voluntary Dismissal Without Prejudice of Civil Action Number PJM-97-3483 Pursuant to Federal Rules of Civil Procedure Rule 41(A)(1)". (See Exhibit "22" of the Declaration of Frank Paul Lukacs dated April 08, 1999 attached to this informal brief in 99-1334 for a copy of the "Notice of Voluntary Dismissal Without Prejudice of Civil Action Number PJM-97-3483 Pursuant to Federal Rules of Civil Procedure Rule 41(A)(1)" filed by Plaintiff-Appellant in PJM-97-3483 on October 07, 1998.) **Federal Rules of Civil Procedure (FRCP) Rule 41 Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof (1) By Plaintiff; by**

Stipulation states that "Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of any United States, **an action may be dismissed by plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, wherever first occurs,** or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, **the dismissal is without prejudice**, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.". **Defendants by October 07, 1998 had not filed either an answer or a motion for summary judgment. Plaintiff-appellant had not even once dismissed in any court of the United States or of any state an action based on or including the same claim.** Thus plaintiff stated on October 07, 1998 in PJM-97-3483 that "Plaintiff respectfully submits this **notice of voluntary dismissal without prejudice** of civil action number PJM-97-3483 pursuant to Federal Rules of Civil Procedure (FRCP) Rule 41 Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof (1) By Plaintiff; by Stipulation." Thus since the notice of voluntary dismissal was without

prejudice, since Defendants by October 07, 1998 had not filed either an answer or a motion for summary judgment, and since plaintiff-appellant had not even once dismissed in any court of the United States or of any state an action based on or including the same claim, PJM-97-3483 can not be used as either claim preclusion or issue preclusion.

"**Dismissal without prejudice is generally not considered an adjudication on the merits of a controversy, and therefore is not entitled to issue preclusive effect.** ... **Dismissal without prejudice not entitled to issue preclusive effect.** See, e.g., *In re Duncan*, 713 F.2d 538, 544 (9th Cir. 1983)." 18 Moore's Federal Practice 3D, § 132.03 [2] [1] [i] (Matthew Bender 3d ed.) under section entitled "Insufficient Procedures for Issue Preclusion Purposes - Dismissals".

"**Claim Preclusion Doctrine Requires *Valid, Final* Judgment that Was Rendered *On the Merits***". 18 Moore's Federal Practice 3D, § 131.30 [1] (Matthew Bender 3d ed.) under section entitled "Judgments that Can Provide Basis for Application of Claim Preclusion Doctrine - Claim Preclusion Doctrine Requires *Valid, Final* Judgment That Was Rendered *On the Merits*".

"**Judgment without prejudice does not preclude subsequent action on same claim.** *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,

396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (**"Dismissal ... "without prejudice" is a dismissal that does not "operate as an adjudication upon the merits"."**)." 18 Moore's Federal Practice 3D, § 131.30 [3] [a] (Matthew Bender 3d ed. 1997) under section entitled "When Judgment is Considered *On the Merits* - Federal Rules Define When Judgment is *On the Merits* for Preclusion Purposes".

"Under the Federal Rules of Civil Procedure, a plaintiff may dismiss an action by notice prior to service of an answer or motion for summary judgment by the adverse party, and thereafter by stipulation signed by all of the parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, **the dismissal will not bar a subsequent action on the same claim - it is deemed "without prejudice". ... Dismissal of action upon plaintiff's motion will be without prejudice.** Fed R. Civ. P. 41(b); see *In re Corey*, 892 F. 829, 835 (9th Cir. 1989), cert. denied sub nom." 18 Moore's Federal Practice 3D, § 131.30 [3] [c] (Matthew Bender 3d ed. 1997) under section entitled "Voluntary Dismissals - Unilateral Dismissal by Plaintiff".

"**A dismissal of an action *without prejudice* is an indication that the judgment is not on the merits and will therefore have no preclusive effect.** Federal Rules of Civil Procedure 41 provides that voluntary

dismissals of an action will usually be considered to be without prejudice unless otherwise indicated in the stipulation or request for dismissal. ... **Dismissal without prejudice indicates that judgment is not on merits and will have no preclusive effect.** see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, L. Ed. 2d 350 (1990) (**""Dismissal without prejudice" is a dismissal that does not "operate as an adjudication upon the merits", Rule 41(a)(1), and thus does not have a res judicata effect".); Restatement (Second) of Judgments § 20(1)(b) 1982."** 18 Moore's Federal Practice 3D, § 131.54 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Avoiding Operation of Claim Preclusion Doctrine - Dismissal Without Prejudice".**

So since PJM-97-379, PJM-97-3359, and PJM-97-3495, and PJM-97-3483 cannot possibly be used for the purposes of claim preclusion or issue preclusion, that really only leaves PJM-96-2913.

III. PJM-96-2913

The original complaint in PJM-96-2913 contained about a half a dozen of plaintiff-appellant's timely filed Equal Employment Opportunity complaints, namely his sixth EEO complaint, (dealing mainly with the reimbursement of relocation expenses,

designated by NIH as NIH #: OEO-157-91 and designated by DHHS as DHHS #: NIH 675-92 but never processed or investigated as it should have been according to 29 C.F.R. § 1614), his seventh EEO complaint (dealing mainly with the so called affirmative action and diversity FEORP and AEP designation and rating criteria for two contract specialist positions CA-91-0159 and OD-91-0162, designated by NIH as NIH #: OEO-015-92 and designated by DHHS as DHHS #: ??? for it was never processed or investigated as it should have been according to 29 C.F.R. § 1614), his tenth EEO complaint (dealing mainly with the nonselection for two contract specialist positions CA-91-0159 and OD-91-0162, designated by NIH as NIH #: OEO-077-92 and designated by DHHS as DHHS #: NIH 703-92 and NIH 218-93 which was later discovered as being identical to # NIH 703-92, but neither of which were ever processed or investigated as it should have been according to 29 C.F.R. § 1614), his twenty ninth EEO complaint (dealing mainly with plaintiff's 29 C.F.R. § 1614 rights as a federal government employee to appeals of his EEO complaints to the Equal Employment Opportunity Commission, designated by NIH as NIH #: OEO-039-94 and designated by DHHS as DHHS #: NIH-027-95 and DHHS #: NIH-094-95, but neither of which were ever processed or investigated as it should have been according to 29 C.F.R. § 1614), his thirty first EEO complaint (dealing mainly with the so called affirmative action and

diversity FEORP and AEP designation and rating criteria for the management cadre program, designated by NIH as NIH #: OEO-122-94 and designated by DHHS as DHHS #: NIH-027-95, but which was not ever processed or investigated as it should have been according to 29 C.F.R. § 1614), and his thirty eighth EEO complaint (dealing mainly with the nonselection for the management cadre program, designated by NIH as NIH #: OEO-030-95 and designated by DHHS as DHHS #: NIH-213-95, but which was not ever processed or investigated as it should have been according to 29 C.F.R. § 1614). ...

Even assuming that the contents of the original complaint in PJM-96-2913 which only contained about a half a dozen of plaintiff-appellant's timely filed Equal Employment Opportunity complaints, namely his sixth EEO complaint, (dealing mainly with the reimbursement of relocation expenses, designated by NIH as NIH #: OEO-157-91 and designated by DHHS as DHHS #: NIH 675-92 but never processed or investigated as it should have been according to 29 C.F.R. § 1614), his seventh EEO complaint (dealing mainly with the so called affirmative action and diversity FEORP and AEP designation and rating criteria for two contract specialist positions CA-91-0159 and OD-91-0162, designated by NIH as NIH #: OEO-015-92 and designated by DHHS as DHHS #: ??? for it was never processed or investigated as it should have been according to 29 C.F.R. § 1614), his tenth EEO complaint

(dealing mainly with the nonselection for two contract specialist positions CA-91-0159 and OD-91-0162, designated by NIH as NIH #: OEO-077-92 and designated by DHHS as DHHS #: NIH 703-92 and NIH 218-93 which was later discovered as being identical to # NIH 703-92, but neither of which were ever processed or investigated as it should have been according to 29 C.F.R. § 1614), his twenty ninth EEO complaint (dealing mainly with plaintiff's 29 C.F.R. § 1614 rights as a federal government employee to appeals of his EEO complaints to the Equal Employment Opportunity Commission, designated by NIH as NIH #: OEO-039-94 and designated by DHHS as DHHS #: NIH-027-95 and DHHS #: NIH-094-95, but neither of which were ever processed or investigated as it should have been according to 29 C.F.R. § 1614), his thirty first EEO complaint (dealing mainly with the so called affirmative action and diversity FEORP and AEP designation and rating criteria for the management cadre program, designated by NIH as NIH #: OEO-122-94 and designated by DHHS as DHHS #: NIH-027-95, but which was not ever processed or investigated as it should have been according to 29 C.F.R. § 1614), and his thirty eighth EEO complaint (dealing mainly with the nonselection for the management cadre program, designated by NIH as NIH #: OEO-030-95 and designated by DHHS as DHHS #: NIH-213-95, but which was not ever processed or investigated as it should have been according to 29 C.F.R. § 1614) might be

used for the purposes of claim preclusion or issue preclusion, that still leaves the other four dozen of plaintiff-appellant's EEO complaints intact which cannot be used for the purposes of claim preclusion or issue preclusion. ...

Even the district court opinion and final order itself in PJM-96-2913 dated November 12, 1998 and entered on November 17, 1998, which is merely a series of misrepresentations and false and deliberately misleading statements, does not purport to address anything except plaintiff-appellant's sixth, seventh, tenth, twenty ninth, thirty first, and thirty eighth EEO complaints. ...

In addition, even this district court opinion and final order regarding plaintiff-appellant's half a dozen EEO complaints, namely his sixth, seventh, tenth, twenty ninth, thirty first, and thirty eighth EEO complaints, is probably meaningless and worthless, especially regarding claim preclusion and issue preclusion.

The district court simply refused to consider plaintiff-appellant's first amended complaint in PJM-96-2913 filed on August 19, 1998, which was a **verified complaint**, according to Federal Rules of Civil Procedure Rule 15 (a) Amendments according to which **"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served"**, for by August 19, 1998 a responsive pleading had not been

served, or for that matter a responsive pleading was never served in any of plaintiff's civil actions, which except for the parties is the exact same complaint which plaintiff-appellant filed in PJM-98-4133, even as regards plaintiff-appellant's half a dozen EEO complaints, namely plaintiff-appellant's sixth, seventh, tenth, twenty ninth, thirty first, and thirty eighth EEO complaints.

The district court simply refused to consider plaintiff-appellant's amended complaint filed on September 08, 1998 in PJM-96-2913, which was a **verified complaint**, and which except for the parties, is the exact same complaint which plaintiff-appellant filed in PJM-98-4133, and which plaintiff-appellant filed according to the specific instructions and directions directing plaintiff-appellant to file a "Motion for Leave to File an Amended Complaint", even as regards plaintiff-appellant's half a dozen EEO complaints, namely plaintiff-appellant's sixth, seventh, tenth, twenty ninth, thirty first, and thirty eighth EEO complaints.

The district court simply refused to consider plaintiff-appellant's "Motion for leave to file the attached statement of material facts that are genuinely in issue and Affidavit and Exhibits of Plaintiff" which was filed on June 13, 1997, and which was docketed on June 16, 1997, with the hearing date originally scheduled for June 23, 1997, with the statement of material facts being 91 pages

long, the affidavit of plaintiff being 103 pages long and containing 336 separately numbered paragraphs, and with there being 52 separate exhibits of plaintiff attached in a two inch thick packet to the affidavit.

Plaintiff-appellant had also filed a **motion for consolidation of PJM-96-2913, PJM-97-379, PJM-97-3359, PJM-97-3483, and PJM-97-3495**, in fact plaintiff-appellant had filed a motion for consolidation in each of his five federal court civil actions, but the motion for consolidation according for Federal Rules of Civil Procedure Rule 42 since these were **"actions involving a common question of law or fact pending before the court"** was completely ignored. ...

A simple broad claim by claim analysis for "Federal Sector Equal Employment Opportunity" civil actions is inappropriate, for the claims themselves are based upon the "**same transaction**" or "**same factual allegation**" of the complaint, which however because of 29 C.F.R. § 1614 is limited in that for each transaction or factual allegation or "**matter alleged to be discriminatory**", to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a separate and distinct Equal Employment Opportunity (EEO) complaint "**within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action**", and thus in

effect **each separate and distinct EEO complaint within 45 days of the date of the matter alleged to be discriminatory is a separate and distinct transaction and a separate and distinct factual allegation for purposes of claim analysis**. ...

In addition, since the original complaint only addressed six separate and distinct EEO complaints and therefore only the "**matters alleged to be discriminatory**" or only the "**transactions**" or only the "**factual allegations**" in those six separate and distinct EEO complaints, the additional four dozen separate and distinct timely filed EEO complaints containing separate and distinct "**claims**" and separate and distinct "**matters alleged to be discriminatory**" and separate and distinct "**transactions**" and separate and distinct "**factual allegations**" and which "**could not have been raised in the prior litigation**" and on which plaintiff-appellant did not have a "**full and fair opportunity to litigate the claim in the prior proceeding**", thus which cannot be used for purposes of claim preclusion or issue preclusion. ...

Plaintiff-appellant had also filed a Rule 56(f) affidavit on June 10, 1997, which was completely ignored by the district court. Even plaintiff-appellant's motion for leave to file the statement of material facts and affidavit and exhibits of plaintiff Frank Paul Lukacs which was filed on June 13, 1997, with

the hearing originally scheduled for June 25, 1997, were completely ignored by the district court. ... Thus even the few remaining claims which were disposed under the motion for summary judgment, since plaintiff-appellant did not have a "**full and fair opportunity to litigate the claims in the prior proceeding**", cannot be used for purposes of claim preclusion or issue preclusion. ...

Plaintiff-appellant stated the following in PJM-98-4133 on February 06, 1999 in his memorandum in support of plaintiff's motion to reconsider the memorandum and order entered January 28, 1999 dismissing civil action PJM-98-4133 "First of all, although plaintiff has requested a copy in writing, plaintiff still does not have a copy of the "order dated November 06, 1998" from civil action number PJM-97-3483, so that he cannot address whatever may have been contained therein.

Second, the court is merely further demonstrating its own prejudices and biases in favor of defendants, and its total lack of even the appearances of impartiality, as if the district court judge were acting as an attorney for defendants rather than an impartial judge to whom both sides could appeal for a fair decision, in sua sponte dismissing PJM-98-4133 before defendants themselves have even filed anything, much less even a motion to dismiss supposedly because of the inapplicable doctrine of res judicata. ...

Fifth, the court seems to purposefully try to add confusion by its incorrect use of the term res judicata.

"Res judicata generally refers only to claim preclusion." For claim preclusion to apply, "at least three elements must be present": "(1) There must have been a final judgment on the merits; (2) The prior action must have involved the same parties or their privies; (3) The prior action must have involved the same claim." Here, the prior action did not involve the same claims. Therefore claim preclusion cannot apply.

Furthermore, claim preclusion does not apply since the "matters did not arise from the same facts, occurrences, or transactions that were the basis of a prior action". Even the EEO complaints themselves upon which the prior actions were based, with an EEO complaint having to be filed within 45 days of the event, were obviously chronologically filed at different time intervals.

Furthermore, the Fourth Circuit follows the "transactional approach to the identity of claims question" in that it has to be the same "transaction, or series of connected transactions, out of which the action arose". Such is not the case here. Here the facts themselves are separated in time and space, for they have had to be of necessity, for according to the relevant rules and

regulations, a separate and distinct EEO complaint has be filed within 45 days of an event, and plaintiff can only go to federal court on separate and distinct EEO complaints, and plaintiff cannot just got to federal court on so called broad claims or issues that are not contained within the fact situations occurring within 45 days immediately preceding the filing of the separate and distinct EEO complaints. Thus the factual allegations themselves cannot possibly be the same for separate and distinct EEO complaints, and thus the claims cannot possibly be the same one for they are based on different factual allegations. Plaintiff's civil complaint PJM-96-2913 only contained the facts of about a half dozen separate and distinct EEO complaints, whereas Plaintiff's civil complaint PJM-98-4133 contains the facts of about four dozen separate and distinct EEO complaints.

Likewise, collateral estoppel or issue preclusion does not apply, for the issues are also different, and issue preclusion only "applies to issues that have been contested and resolved", and does not apply to those issues which were not litigated. "Issue preclusion only precludes litigation of issues actually litigated and necessary to the outcome of the prior case".

Thus, with what is left, the district

court's entire analysis relies entirely upon the phrases "policies and practices allegedly used at NIH/NCI that were not raised in prior litigation", with the admission by the court that these different "facts, occurrences, or transactions were not the basis of a prior action", thereby the district court itself negating its own conclusion regarding res judicata, but that nevertheless supposedly "plaintiff's complaints against these policies and practices could have been fully raised in the earlier litigation". **The reality of the matter however is that it was the district court itself who simply refused to allow plaintiff to "fully raise these matters", and thus because of the district court's own inappropriate and incorrect actions these "matters could not possibly have been fully raised".**

For instance, plaintiff tried to "raise these matters" in PJM-96-2913 by filing an amended complaint, one to which he had a right, since according to Rule 15 (a) "a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served", which by the way, except for the different parties, is the exact same complaint as herein filed in PJM-98-4133, but the district court refused to allow plaintiff to "raise these matters".

In addition, plaintiff tried to "raise these matters" in PJM-96-2913 [and PJM-97-3483] by filing an amended complaint according

the specific instructions and directions of the district court by filing a motion to amend the pleading by leave of court "and leave shall be freely given when justice so requires", but it was the district court itself which refused to even consider the motion to amend the pleading by leave of court.

Thus the reality of the matter is that it is none other than the district court judge who simply refused to allow plaintiff to fully raise these matters in the earlier litigation, and then the district court judge has the audacity to turn around and falsely state that these matters "could have been fully raised in the earlier litigation"." ...

Plaintiff-appellant stated the following in PJM-98-4133 on March 01, 1999 in his reply memorandum in further support of plaintiff's motion to reconsider the memorandum and order entered January 28, 1999 dismissing civil action PJM-98-4133, and in response to "defendant's opposition to plaintiff's motion to reconsider the memorandum and order entered January 28, 1999 dismissing civil action PJM-98-4133" dated February 19, 1999:

"First, since plaintiff has not previously filed any arguments "in this case", in fact since plaintiff has not previously filed anything in this case except for the original complaint, it is entirely illogical for defendants to so authoritatively, but

rather inaccurately, as if they had not read anything "in this case" at all, state that "Plaintiff's motion to reconsider is in essence a restatement of arguments previously made in this case". The only way that "in this case" would make any sense at all is if plaintiff's previous cases had been consolidated, which they were not, so that "in this case" can only refer to PJM-98-4133.

Second, shouldn't defendants have first filed their rationale and opinion in this case, then shouldn't plaintiff have been given an opportunity to respond to defendants rationale and opinion in this case, and then a district court judge with at least the appearances of impartiality have made a decision. It is rather obvious however, that "in this case" the district court judge not having any appearances of impartiality whatsoever, in effect in having taken over the representation of defendants, has skipped the middleman, namely the United States Attorney, and has written not only defendants motion to dismiss with its rationale and opinion, but has also adopted "the rationale and opinion of" defendants supposed representatives. Thus the very sentence that "The Defendant, further adopts the rationale and opinion of this Court's order" is to say the least backwards, and is merely and admission of what is really happening "in this case".

Third, the Assistant United States Attorney, seems rather naive enough to think,

and does not seem to understand, that "in this case" it is even necessary for him to on behalf of defendants, "by and through her undersigned attorneys", even bother to write anything at all, much less a "defendant's opposition to plaintiff's motion to reconsider the memorandum and order entered January 28, 1999 dismissing civil action PJM-98-4133". The Assistant United States Attorney, acting under the delusion that he is in any way at all representing the defendants, seems rather naive, and does not seem to understand, that "in this case" he does not have to do anything at all, for it is the district court judge who is in effect actually representing defendants and who will do it all for him. Perhaps the assistant United States Attorney should read the file in PJM-97-379, in PJM-97-3359, and in PJM-97-3495, in which the then Assistant United States Attorney on behalf of defendants never mentioned, never even intimated, never even remotely suggested, much less actually proposed, that the claims were duplicative, and in which to boot plaintiff was following the specific directions and instructions of none other than defendants. (Since the district court judge acted sua sponte without any benefit of the facts, and without even appearing interested in any of the facts, perhaps for future reference with some other plaintiffs, perhaps with some minority or female or hispanic plaintiffs rather than as "in this case" with a white male plaintiff,

the district court judge should for his own edification read that which is contained in plaintiff-appellant's informal brief with the attached exhibits.) The district court judge totally ignored everything that plaintiff or the assistant United States Attorney wrote and instead acted sua sponte. My only advice to the new assistant United States Attorney assigned "in this case" is to just sit back and relax and let the district court judge do all of his work for him, which is already what has happened "in this case" anyway, for "defendant's opposition to plaintiff's motion to reconsider the memorandum and opinion and order entered January 28, 1999 dismissing civil action PJM-98-4133" by the date of its mailing on February 19, 1998 was already moot. The whole point is that the district court judge on behalf of defendants had already in effect filed "defendants opposition to plaintiff's motion to reconsider the memorandum and order entered January 28, 1999 dismissing civil action PJM-98-4133" on February 17, 1999.

Even where trial courts raise preclusion issues sua sponte, "the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied. ***State of Nevada Employees Ass'n, Inc. v. Keating,*** **903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498**

U.S. 999 (1990) (sua sponte application of preclusion not appropriate when court did not allow briefing on issue)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.)." ...

As appellant has previously stated:

"Res judicata generally refers only to claim preclusion." For claim preclusion to apply, "at least three elements must be present": "(1) **There must have been a final judgment on the merits**; (2) The prior action must have involved the same parties or their privies; (3) **The prior action must have involved the same claim**." Here, there has not been a final judgment on the merits and the prior action did not involve the same claims. Therefore claim preclusion cannot apply.

Furthermore, claim preclusion does not apply since the **"matters did not arise from the same facts, occurrences, or transactions that were the basis of a prior action"**. Even the EEO complaints themselves upon which the prior actions were based, with an EEO complaint having to be filed within 45 days of the event, were obviously chronologically filed at different time intervals.

A simple broad claim by claim comparison for "Federal Sector Equal Employment Opportunity" (to use the words of 29 C.F.R. § 1614) civil actions is inappropriate, for the claims themselves are based upon the

"transactions" or "factual allegations" of the complaint, which however because of 29 C.F.R. § 1614 is limited in that for each transaction or factual allegation or "matter alleged to be discriminatory", to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a different, separate, and distinct Equal Employment Opportunity (EEO) complaint "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action", and thus in effect each different, separate, and distinct EEO complaint within 45 days of the date of the matter alleged to be discriminatory is a different, separate, and distinct transaction and a different, separate, and distinct factual allegation for purposes of claim analysis.

In addition, since the initial pleading of PJM-96-2913 only addressed about a half dozen different, separate, and distinct timely filed EEO complaints and therefore addressed only the "matters alleged to be discriminatory" or only the "transactions" or only the "factual allegations" in those different, separate, and distinct EEO complaints, the pleading of PJM-98-4133 addressing an additional three dozen different, separate, and distinct timely filed EEO complaints containing different, separate,

and distinct "claims" and different, separate, and distinct "matters alleged to be discriminatory" and different, separate, and distinct "transactions" and different, separate, and distinct "factual allegations", and which "could not have been raised in the prior litigation" and on which plaintiff-appellant did not have a "full and fair opportunity to litigate the claim in the prior proceeding" to boot, cannot be used for purposes of claim preclusion or issue preclusion or even duplication of claims.

"Modern courts, in applying the *Cromwell* definition of the claim preclusion doctrine, have stated that at least three elements must be present before a claim will be barred as a result of a judgment in a prior action:

(1) there must have been a final judgment on the merits

(2) the prior action must have involved the same parties or their privies

(3) the prior action must have involved the same claim.

18 Moore's Federal Practice 3D, § 131.01 (Matthew Bender 3d ed.) under section entitled "Fundamental Principles of Claim Preclusion (Res Judicata) Doctrine - Doctrine Bars Claims Which Were Subject of Prior Judgment".

In addition, it is only those "matters that arise from the same facts, occurrences, or transactions that were the basis of a prior

action may be within the scope of claim preclusion by that action". 18 Moore's Federal Practice 3D, § 131.10 [3] [c] (Matthew Bender 3d ed.). In addition it is only applicable if there is "liberal joinder and amendment, and broad discovery rights, [and the] parties [have] had sufficient opportunity to present all of their related claims and defenses in the same action". 18 Moore's Federal Practice 3D, § 131.11 [3] (Matthew Bender 3d ed.).

"The basic difference between claim preclusion and issue preclusion is simply put: claim preclusion applies to whole claims, whether litigated or not, whereas issue preclusion applies to particular issues that have been contested and resolved." 18 Moore's Federal Practice 3D, § 131.13 [1] (Matthew Bender 3d ed.) under section entitled "Claim Preclusion in Comparison With Other Judicial Doctrines - Issue Preclusion (Collateral Estoppel)".

"At the heart of claim preclusion is the concept of what constitutes a claim. ... The most widely accepted method for determining whether a claim being asserted is pending action is, for purposes of claim preclusion, the same claim which was or could have been asserted in a prior action is the **transactional approach** described in § 24 of the Restatement (Second) of Judgments. This section reads as follows:

(1) When a valid and final judgment

> rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ... the claim extinguished included all rights of the plaintiff to remedies against the defendant with respect to all or any part of the **transaction**, or series of connected transactions, out of which the action arose.
>
> (2) What factual groupings constitutes a **"transaction"**, and what groupings constitute a "series" are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. ...

Courts adopting Restatement approach. *4th Circuit Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir.), cert. denied sub non. **Keith v. Rice**, 498 U.S. 900 (1990) ("Consistent with the modern trend ... we have adopted a **transactional approach** to the identity of claims question.") 18 Moore's Federal Practice 3D, § 131.20 [2] (Matthew Bender 3d ed.) under section entitled **"Same Transaction Test"**.

"The Seventh Circuit has rejected the Restatement approach to the scope of claim preclusion, and adopted a test that focuses on

the **factual allegations** in the prior and subsequent actions. In the Seventh Circuit, claims will be considered the same if they are based on the same or nearly the **same factual allegations**. ... **Same factual allegations test.** *Hermann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 226 (7th Cir. 1993) (claims are one if based on same factual allegations). *4th Circuit Jones v. Pointdexter*, 903 F.2d 1006, 1010 (4th Cir. 1990) (applying Virginia law); *Snell v. Mayor and City Council of Havre de Grace*, 837 F.2d 173, 176 (4th Cir. 1988) (applying Maryland law). ... The factual allegations approach adopted by the Seventh Circuit does have the advantage that it is relatively easy to administer at an early stage of litigation. Factual allegations are found in the pleadings, and the comparison of such allegations will, in most cases, be relatively straightforward. To date, the factual allegations test has not been explicitly adopted outside the Seventh Circuit, although the test has been used without comment in other circuits. **Factual allegations test** used in other circuits. *4th Circuit Jones v. Pointdexter*, 903 F.2d 1006, 1010 (4th Cir. 1990) (applying Virginia law); *Snell v. Mayor and City Council of Havre de Grace*, 837 F.2d 173, 176 (4th Cir. 1988) (applying Maryland law)." 18 Moore's Federal Practice 3D, § 131.20 [3] (Matthew Bender 3d ed.) under section entitled **"Same Factual Allegations Test for Identity of Claims"**.

"**Claim preclusion does not require a plaintiff to bring *every* claim that the plaintiff may have against a particular defendant in one action.** Such a requirement might well work against the very policy concerns of judicial efficiency and fairness to the parties that are the basis of the doctrine. Rather, only those claims that fall within the criteria set forth in the various approaches to the scope of claim preclusion described above must be brought in the same action. In *Doe v. Allied Signal, Inc.*, the Court of Appeals for the Seventh Circuit provided an example of multiple claims arising within the same general fact pattern that were appropriately the subject of separate actions. ... Example of multiple claims arising within same fact pattern but litigated in separate actions. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914 (7th Cir. 1993) (**plaintiff is not obligated to bring all claims together if they do not arise from same transaction**). ... **Identifying multiple claims within a single chain of events requires careful review of the facts and theories comprising the claims, but courts regularly find such multiple claims to exist. ... Courts regularly find multiple claims to exist.** *2d Circuit* see *NLRB v. Union Techs. Corp.*, 796 F.2d 1254, 1259-1260 (2d Cir. 1983) (action by union was not barred even though it involved same rule and same contract provision as prior action; the court

stated **"[T]he circumstances that several operative facts may be common to successive actions between the same parties does not mean that the claim asserted in the second is the same claim that was litigated in the first, and that litigation of the second is therefore precluded by the judgment in the first."**). *11th Circuit Wu v. Thomas*, 863 F.2d 1543, 1548-1549 (11th Cir. 1989) (action for retaliation not barred by prior action for civil rights violation, even though prior action included some testimony regarding retaliation)." 18 Moore's Federal Practice 3D, § 131.22 [2] (Matthew Bender 3d ed.) under section entitled "Claims Existing at Time of Prior Action But Outside Scope of Claim Preclusion".

"Many of the most difficult questions concerning the scope of claim preclusion arise in the context of continuing wrongful conduct. ... Whatever the cut-off date, **a continuing series of wrongful acts resulting in ongoing damage to the plaintiff will usually permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine. ... Continuing series of wrongful acts will usually permit series of actions.** *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) (**each time plaintiff is**

injured by defendant, cause of action accrues); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (series of torts will give rise to several causes of action); see *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), cert. denied, 459 U.S. 943 (1982) (continuing antitrust violations); *United Food & Commercial v. City Foods, Inc.*, 878 F. Supp. 122, 123 (N.D.Ill. 1995) (**"[A] defendant's continuing course of conduct, even if related to conduct complained of in the earlier lawsuit, generally creates a separate cause of action."**) 18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled "Continuing Wrongful Conduct by Defendant".

Some of the facts of the five federal court civil actions can be characterized as **"continuing wrongful conduct by defendant"**.

"Acquiescence also occurs when a defendant allows two simultaneous actions on the same claim to proceed without objection. ... Acquiescence by allowing two simultaneous actions. Restatement (Second) of Judgments § 26 cmt. a & illus. 1 (1982). ... *7th Circuit Imperial Constr. Management v. Laborers Int'l Local 96*, 729 F. Supp. 1199, 1206 (N.D.Ill. 1990) (defendants' failure to object to plaintiff's prosection of two simultaneous lawsuits for more than two years constituted

acquiescence in plaintiff's claim-splitting that prevented application of claim preclusion based on dismissal of one action). *9th Circuit See Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988), cert. denied, 488 U.S. 948 (1988) (both cases had been pending in federal courts in same district for approximately 18 months without objection from defendant). 18 Moore's Federal Practice 3D, § 131.24 [1] (Matthew Bender 3d ed.) under section entitled "Exceptions to Claim Preclusion Doctrine Against Claim Splitting - Agreement or Acquiescence to Claim-Splitting".

Defendants have not only acquiesced in plaintiff-appellant's claim splitting, but in fact defendants were the one instructing and directing plaintiff-appellant to file another federal court civil action within 90 days of their final agency decision as per the relevant regulations of 29 C.F.R. § 1614.

"Since claim preclusion is an affirmative defense, the burden is on the party asserting it to prove all of the elements necessary for its application. ... Burden is on party asserting claim preclusion to prove all elements necessary for its application. ... **Burden is on party asserting claim preclusion to prove all elements necessary for its application.** ... *2d Circuit Thomas v. New York City*, 814 F. Supp. 1139, 1148 (E.D.N.Y. 1993) ("None of the defendants have met their

burden in asserting either preclusion doctrine.") *9th Circuit* *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 n.4 (9th Cir. 1988) (when defendants failed to introduce judgment, complaint, or any other evidence of prior action upon which their assertion of claim preclusion was based, they did not meet their burden of establishing preclusion). *11th Circuit* See *Concordia v. Bendekovic*, 693 F.2d 1073, 1076 (11th Cir. 1982) (insufficient evidence in record to determine whether prior judgment was final and therefore had preclusive effect)." 18 Moore's Federal Practice 3D, § 131.52 [1] (Matthew Bender 3d ed.) under section entitled "Proving Necessary Elements of Claim Preclusion - Burden of Proof".

If defendants had brought up claim preclusion or issue preclusion, they would have had to meet their burden of proof and to have proven the necessary elements of claim preclusion and issue preclusion, which they would not have been able to do, so the court knew it had to bypass this procedural obstacle in the way of its predetermined outcome, again lending credence to plaintiff-appellants allegation that the district court judge does not even have the appearance of impartiality. While we are on the subject, even the district court judge did not meet its burden of proving the necessary elements of claim preclusion or issue preclusion, which is probably the district court instead chose to totally ignore

any specifics and instead merely wrote totally meaningless conclusory generalizations.

"[T]rial courts (and appellate courts as well) may raise preclusion issues sua sponte. Of course, **the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. ... Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied.** Compare *McClain v. Apodaca*, 793 F.2d 1031, 1032-1033 (9th Cir. 1986) (**sua sponte application of preclusion appropriate when district court heard evidence and gave both parties opportunity to address issue before ruling**) with *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (**sua sponte application of preclusion not appropriate when court did not allow briefing on issue**)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

As the record amply demonstrates, plaintiff-appellant did not have **reasonable notice and opportunity to be heard *before* the application of claim preclusion by the court**, and in fact plaintiff-appellant did not have any notice at all or opportunity to be heard **before** the application of claim preclusion by the court. Thus although the relevant cases state that "**Parties must have reasonable notice and opportunity to be heard *before***

claim preclusion is applied", here the district court was in such a hurry to apply claim preclusion and issue preclusion, especially in a totally conclusory and meaningless manner, especially before defendants even had to answer, probably considering defendants supposed representatives the Department of Justice too incompetent to bring up, or meet the burden of proof on, claim preclusion or issue preclusion on their own, that the district court totally ignored the relevant case law. Then again the district court judge has been acting more like the real representative for defendants anyway, replacing the supposed representatives for defendants the Department of Justice, of whose professional legal competence the district court judge must have an even lower opinion than that of plaintiff-appellant pro se. ...

APPENDIX CCC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*08/06/99
FRANK PAUL LUKACS	*
Plaintiff	*USCAFC Docket #
v.	*99-1334
DONNA E. SHALALA, et al.	*
Defendants	*D. Maryland #
* * * * * * * * * * * * * * *	*CA-98-4133-PJM

PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

Now comes the Appellant and hereby files a petition for rehearing according to FRAP 40 and hereby files a petition for rehearing en banc according FRAP 35.

STATEMENT OF COUNSEL REGARDING PURPOSE

Appellant directs the Court's attention to the following situations which exist as described in the purpose section of the notice of judgment: 1. "**Every material fact and law** is overlooked in the decision." 3. "The opinion is in conflict with **every decision** of the United States Supreme Court, with **every decision** of this Court, and with **every decision** of every other court of appeals, and the conflict is not addressed in the opinion." 4. "The proceeding involves one or more questions of exceptional importance, as the

appeal involves a question of first impression."

The misleading and **factually incorrect** appellate court opinion is in conflict with **every** decision of the Fourth Circuit as well as in conflict with **every** other decision of every other circuit regarding the requirement that **"there must have been a final judgment on the merits"** and that **"the prior action must have involved the same claim"** for the claim preclusion doctrine to apply, and is in conflict with every decision of every circuit whether using the **transactional approach** or the **factual allegations approach** for claim preclusion. The misleading and **factually incorrect** appellate court opinion totally negates **42 USC § 2000e-16 (Title VII) and 29 C.F.R. § 1614** regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances.

It is rather apparent from the rather short opinion itself that the Appellate Court, in its very decision trying to justify its judgment, by its very silence on the topic, and even with more legal knowledge and expertise and capability at doing computer legal database searches, apparently **could not find even one appellate court decision, could not find even one district court case, either in the Fourth Circuit, or in any other circuit for that matter, in support of its completely erroneous decision. Not only that, every**

other decision from every other court regarding the matter has come to a totally different conclusion.

The reality of the matter is that if the district court and the appellate court do not see anything wrong with the district court ordering plaintiff-appellant not to file any pleadings and not to file any motions and preventing plaintiff-appellant from even being able to docket much less actually consider an amended pleading according to FRCP Rule 15(a) which states that **"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served"**, with defendants never having served any responsive pleading, then of course the district court and the appellate court will not see anything wrong with the district court applying claim preclusion to the very claims of the amended pleading which the district court in writing simply refused to allow even be docketed much less to actually consider. The only question is whether the district court's and the appellate court's actions are because plaintiff-appellant is a white male who is pro se and is challenging the federal government's so called affirmative action and diversity programs for minorities and females and hispanics, and is not a minority being represented by the NAACP Legal Defense and Education and is not a female being represented by the NOW Legal Defense and Education Fund and is not a hispanic being

represented by the Mexican American Legal Defense Fund, in which case the district court and the appellate court would certainly have encouraged and assisted in the filing and docketing of not just one but several amended pleadings. Besides this particular white male was only discharged from employment because of his EEO activity and has been unemployed for four years now as a result, and this is apparently not perceived to be anywhere near as serious as a minority not being immediately waited upon and served in a sit down restaurant. **The reality of the matter is that the district court and the appellate court are merely hereby showing their own prejudices and biases. If the same thing had happened to a minority or a female or a hispanic, the district court opinions and the appellate court opinions would be justifiably indignant, but since appellant is only a first generation legal immigrant white male he is not even allowed to file or have docketed or to have considered even one amended pleading "as a matter of course at any time before a responsive pleading is served". This is nothing less than discrimination on the very part of the district court and the appellate court.**

As appellant has previously stated regarding the issues:

"With a white male appellant challenging the legality and constitutionality of the

United States federal government's so called affirmative action and diversity programs for minorities and females and hispanics, does it even have any semblance of the appearance of impartiality for a district court judge appointed by a President who is the most vocal supporter of so called affirmative action and diversity programs for minorities and females and hispanics for his own political purposes to basically take over the representation of the case from the Department of Justice via its sua sponte memorandums and opinions, whose contents have not even been remotely intimated or suggested much less actually been proposed by the representatives of defendants the Department of Justice, and to totally ignore all the relevant published and unpublished legal precedent and make up his own sham, phony, bogus, and counterfeit theories in memorandum, opinions, and orders which are merely a series of misrepresentations and false and deliberately misleading statements?

Does it even have the appearance of fairness, much less being an abuse of discretion, for a district court judge to first order that plaintiff shall not file any motions or pleadings, not even to **"amend the party's pleading once as a matter of course at any time before a responsive pleading is served"**, and that the clerk not docket any such motions or pleadings, and therefore that the issues and claims which are contained in plaintiff's proposed **amended verified**

pleadings which are either physically returned to plaintiff without even being docketed or else are specifically in writing by the district court judge rather contemptuously not even considered, and which issues and claims therefore are not even permitted to be raised by plaintiff under threat of sanctions, and then for the district court judge to later turn around and nevertheless rather hypocritically state that these same issues and claims "could have been fully raised in the earlier litigation", especially when it was the district court judge who specifically refused to even allow plaintiff any opportunity to even raise the issues and claims in the earlier litigation, much less actually consider them in the earlier litigation?

Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, which no one has even remotely intimated is the situation here, does a district court have the power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure, or dismissing and refusing to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP, and then thereafter having the audacity to conclude that although plaintiff was never even permitted to file pleadings,

motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure containing and raising issues and claims, that these issues and claims which were therefore not raised or considered because of memorandums and orders of the district court that they could not be raised under the threat of sanctions and which would not be considered even if filed, and which issues and claims would have been raised and contained in the prohibited pleadings, motions, affidavits, or appeals authorized by the FRCP, and which should have been considered by the district court, could nevertheless somehow or other supposedly "have been fully raised in the earlier litigation"?

Does a continuing series of wrongful acts resulting in ongoing damage to the plaintiff permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine?

Will issue preclusion or claim preclusion be applied against a party if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the issue or claim in the prior proceeding?

Must the parties have reasonable notice and opportunity to be heard before the sua sponte application of claim preclusion by the district court?"

STATEMENT OF FACTS AND REASONS REGARDING THE PETITIONS

As appellant has previously stated regarding PJM-97-3483:

"Plaintiff-Appellant attempted to amend his complaint in PJM-97-3483, which at the time included only about a dozen of plaintiff-appellant's EEO complaints, with a **verified pleading**, which except for the parties, was the exact same complaint which was filed in PJM-98-4133, and which would therefore contain about four dozen of plaintiff-appellant's EEO complaints.

Unfortunately, Plaintiff-Appellant's "Motion for Leave to File an Amended Complaint" in PJM-97-3483 dated September 08, 1998, "Memorandum in Support of Plaintiff's Motion for Leave to File an Amended Complaint" in PJM-97-3483 dated September 08, 1998, and "Amended Complaint" in PJM-97-3483 were not even allowed to be docketed by the district court judge, and in fact were physically returned to plaintiff-appellant with the notation that "Pursuant to the verbage in attached Memorandum Opinion and Order (signed by Judge Peter J. Messitte, dated September 8, 1998), no further pleadings are to be filed", with the exact wording of the order of the district court judge rather coincidentally being dated September 08, 1998 but rather coincidentally not being filed until September 15, 1998, being that "neither party shall file

further pleadings in this Court".

Thus, the district court judge simply refused to even have docketed much less consider the contents of plaintiff-appellant's amended **verified pleading** in PJM-97-3483, which except for the parties, was the exact same complaint which was filed in PJM-98-4133. It is simply non sequitur, not to mention totally unfair, that the contents of the amended complaint which the district court judge simply refused to even allow be docketed much less actually consider should now be used for the purposes of claim preclusion or issue preclusion. That scenario makes no sense whatsoever. To first not even allow the contents of the amended complaint to be docketed and then to turn around and state that the contents of that amended complaint which was not even allowed to be docketed much less actually considered, can nevertheless be used for the purposes of claim preclusion or issue preclusion is totally absurd. To state that the claims and issues "could have been fully raised in the earlier litigation" is totally contradicted by the district court's own actions in refusing to even allow the contents of the amended complaint to be docketed much less actually consider the contents of the amended complaint.

Plaintiff-Appellant in PJM-97-3483 on October 07, 1998 filed a "Notice of Voluntary Dismissal Without Prejudice of Civil Action Number PJM-97-3483 Pursuant to Federal Rules

of Civil Procedure Rule 41(A)(1)". **Federal Rules of Civil Procedure (FRCP) Rule 41 Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof (1) By Plaintiff; by Stipulation** states that "Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of any United States, **an action may be dismissed by plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, wherever first occurs,** or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, **the dismissal is without prejudice**, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.". **Defendants by October 07, 1998 had not filed either an answer or a motion for summary judgment. Plaintiff-appellant had not even once dismissed in any court of the United States or of any state an action based on or including the same claim.** Thus plaintiff stated on October 07, 1998 in PJM-97-3483 that "Plaintiff respectfully submits this **notice of voluntary dismissal without prejudice** of civil action number PJM-97-3483 pursuant to Federal Rules of Civil

Procedure (FRCP) Rule 41 Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof (1) By Plaintiff; by Stipulation." Thus since the notice of voluntary dismissal was without prejudice, since Defendants by October 07, 1998 had not filed either an answer or a motion for summary judgment, and since plaintiff-appellant had not even once dismissed in any court of the United States or of any state an action based on or including the same claim, PJM-97-3483 can not be used as either claim preclusion or issue preclusion."

The district court judge, without any case law at all, writes that dismissal without prejudice does have a res judicata effect. The appellate court, also without any case law at all, agrees that dismissal without prejudice does have a res judicata effect.

"**Dismissal without prejudice is generally not considered an adjudication on the merits of a controversy, and therefore is not entitled to issue preclusive effect.** ... **Dismissal without prejudice not entitled to issue preclusive effect.** See, e.g., *In re Duncan*, 713 F.2d 538, 544 (9th Cir. 1983)." 18 Moore's Federal Practice 3D, § 132.03 [2] [1] [i] (Matthew Bender 3d ed.) under section entitled "Insufficient Procedures for Issue Preclusion Purposes - Dismissals".

"Claim Preclusion Doctrine Requires *Valid, Final* Judgment that Was Rendered *On the Merits*". 18 Moore's Federal Practice 3D, § 131.30 [1] (Matthew Bender 3d ed.) under

section entitled "Judgments that Can Provide Basis for Application of Claim Preclusion Doctrine - Claim Preclusion Doctrine Requires *Valid, Final* Judgment That Was Rendered *On the Merits*".

"**Judgment without prejudice does not preclude subsequent action on same claim.** *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (**"Dismissal ... "without prejudice" is a dismissal that does not "operate as an adjudication upon the merits".**)." 18 Moore's Federal Practice 3D, § 131.30 [3] [a] (Matthew Bender 3d ed. 1997) under section entitled "When Judgment is Considered *On the Merits* - Federal Rules Define When Judgment is *On the Merits* for Preclusion Purposes".

"Under the Federal Rules of Civil Procedure, a plaintiff may dismiss an action by notice prior to service of an answer or motion for summary judgment by the adverse party, and thereafter by stipulation signed by all of the parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, **the dismissal will not bar a subsequent action on the same claim - it is deemed "without prejudice"**. ... **Dismissal of action upon plaintiff's motion will be without prejudice.** Fed R. Civ. P. 41(b); see *In re Corey*, 892 F. 829, 835 (9th Cir. 1989), cert. denied sub nom." 18 Moore's Federal Practice 3D, § 131.30 [3] [c] (Matthew Bender 3d ed.

1997) under section entitled "Voluntary Dismissals - Unilateral Dismissal by Plaintiff".

"**A dismissal of an action *without prejudice* is an indication that the judgment is not on the merits and will therefore have no preclusive effect.** Federal Rules of Civil Procedure 41 provides that voluntary dismissals of an action will usually be considered to be without prejudice unless otherwise indicated in the stipulation or request for dismissal. ... **Dismissal without prejudice indicates that judgment is not on merits and will have no preclusive effect.** see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, L. Ed. 2d 350 (1990) (""**Dismissal without prejudice" is a dismissal that does not "operate as an adjudication upon the merits", Rule 41(a)(1), and thus does not have a res judicata effect".); Restatement (Second) of Judgments § 20(1)(b) 1982."** 18 Moore's Federal Practice 3D, § 131.54 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Avoiding Operation of Claim Preclusion Doctrine - Dismissal Without Prejudice".**

Appellant has previously stated regarding PJM-96-2913:

The original pleading in PJM-96-2913 contained about a half a dozen of plaintiff-appellant's timely filed Equal Employment

Opportunity complaints, namely his sixth, his seventh, his tenth, his twenty ninth, his thirty first, and his thirty eighth EEO complaints, none of which were ever processed or investigated as they should have been according to 29 C.F.R. § 1614.

Plaintiff-Appellant tried to amend his original pleading in PJM-96-2913 to include about four dozen more of his separate and distinct Equal Employment Opportunity (EEO) complaints.

Plaintiff-Appellant filed an **amended verified complaint** in PJM-96-2913 on August 19, 1998, according to Federal Rules of Civil Procedure Rule 15 (a) Amendments by which **"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served"**, for by August 19, 1998 a responsive pleading had not been served, and for that matter a responsive pleading was never served in any of plaintiff's civil actions, which except for the parties, is the exact same complaint which plaintiff-appellant filed in PJM-98-4133.

An order of the district court physically returned plaintiff-appellant's **amended verified complaint** filed on August 19, 1998, in an envelope dated September 02, 1998, for supposedly "A "Motion for Leave to File an Amended Complaint" and proposed Summonses prepared in blank is required (in duplicate)".

Plaintiff-Appellant filed an **amended verified complaint** on September 08, 1998 in

PJM-96-2913, which, except for the parties, is the exact same complaint which plaintiff-appellant filed in PJM-98-4133, and which plaintiff-appellant filed according to the specific instructions and directions contained in an order of the district court mailed in an envelope dated September 02, 1998, instructing plaintiff-appellant to file "A Motion for Leave to File an Amended Complaint" with the amended complaint.

An order of the district court in PJM-96-2913 specifically in writing refused to even consider plaintiff-appellant's "Motion for Leave to File an Amended Complaint" with the amended complaint dated September 08, 1998, which is paper numbered 75 in the docket sheet of PJM-96-2913, and which was filed according to the specific instructions and directions of the district court which directed plaintiff-appellant to file a "Motion for Leave to File an Amended Complaint" with the amended complaint.

So in reality, because of none other than the orders of the district court itself, there is nothing left of PJM-96-2913 which can even be used for purposes of claim or issue preclusion.

Even the district court opinion and final order itself in PJM-96-2913 dated November 12, 1998 and entered on November 17, 1998, which is merely **a series of misrepresentations and false and deliberately misleading statements**,

does not purport to address anything except plaintiff-appellant's sixth, seventh, tenth, twenty ninth, thirty first, and thirty eighth EEO complaints.

A simple broad claim by claim analysis for "Federal Sector Equal Employment Opportunity" civil actions is inappropriate, for the claims themselves are based upon the "**same transaction**" or "**same factual allegation**" of the complaint, which however because of 29 C.F.R. § 1614 is limited in that for each transaction or factual allegation or "**matter alleged to be discriminatory**", to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a separate and distinct Equal Employment Opportunity (EEO) complaint "**within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action**", and thus in effect **each separate and distinct EEO complaint within 45 days of the date of the matter alleged to be discriminatory is a separate and distinct transaction and a separate and distinct factual allegation for purposes of claim analysis.**

Claim preclusion does not apply since the "matters did not arise from the same facts, occurrences, or transactions that were the basis of a prior action". Even the EEO complaints themselves upon which the prior actions were based, with an EEO complaint

having to be filed within 45 days of the event, were obviously chronologically filed at different time intervals.

The Fourth Circuit follows the "transactional approach to the identity of claims question" in that it has to be the same "transaction, or series of connected transactions, out of which the action arose". Such is not the case here. Here the facts themselves are separated in time and space, for they have had to be of necessity, for according to the relevant rules and regulations, a separate and distinct EEO complaint has be filed within 45 days of an event, and plaintiff can only go to federal court on separate and distinct EEO complaints, and plaintiff cannot just got to federal court on so called broad claims or issues that are not contained within the fact situations occurring within 45 days immediately preceding the filing of the separate and distinct EEO complaints. Thus the factual allegations themselves cannot possibly be the same for separate and distinct EEO complaints, and thus the claims cannot possibly be the same one for they are based on different factual allegations. Plaintiff's civil complaint PJM-96-2913 only contained the facts of about a half dozen separate and distinct EEO complaints, whereas Plaintiff's civil complaint PJM-98-4133 contains the facts of

about four dozen separate and distinct EEO complaints.

Likewise, collateral estoppel or issue preclusion does not apply, for the issues are also different, and issue preclusion only "applies to issues that have been contested and resolved", and does not apply to those issues which were not litigated. "Issue preclusion only precludes litigation of issues actually litigated and necessary to the outcome of the prior case".

"The doctrine of issue preclusion applies only when the issues presented in each matter are identical. ... Identity of Issues. *Montana v. United States*, 440 U.S. 147, 155, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) ("The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged" adversely to government in state court). ... **Issue preclusion does not apply when the issues in the prior and current litigation are not identical, even though similar. ... Issues not identical.** *4th Circuit Brewster Inc. v. Dian Corp.*, 33 F.3d 355, 364 (4th Cir. 1994) (prior issue was whether parties' relationship was covered by two separate agreements; issue in instant case was which version of escape clause was incorporated)." 18 Moore's Federal Practice 3D, § 132.02 [2] [a] (Matthew Bender 3d ed.) under section entitled "Identity of

Issues - Issue Decided in First Case Arises in Subsequent Litigation".

As a matter of practicality, the facts of a half dozen of plaintiff-appellant's EEO complaints in PJM-96-2913 could not have been the same as the facts of a different four dozen of plaintiff-appellant's EEO complaints in PJM-98-4133, with all of them being timely filed in different time periods over the course of several years within [initially 30 and later] "45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action" as per the relevant and controlling 29 C.F.R. § 1614.

Even however if one nevertheless does perform a simple and basic cursory claim by claim analysis, the original complaint in PJM-96-2913 did not include any claims at all for harassment or constructive discharge. Although plaintiff-appellant attempted to introduce claims for harassment and constructive discharge in his amended complaints, these amended complaints were either not allowed to even be docketed and physically returned to plaintiff-appellant or completely purposefully by a written order of the district court not even considered by the district court. Thus it was because of the district court actions themselves that appellant could not raise the claims of harassment and retaliatory constructive

discharge and thus these claims were "**matters which could not have been raised in prior litigation**" and on which plaintiff-appellant did not have a "**full and fair opportunity to litigate the claim in the prior proceeding**" and thus cannot be used for purposes of claim preclusion or issue preclusion.

"**For issue preclusion to apply, the issue must have actually been litigated.** ... *11th Circuit Wu v. Thomas*, 863 F.2d 1543, 1548-1549 (11th Cir.), reh'g denied, 871 F.2d 122 (11th Cir. 1989) (in second employment discrimination suit under federal law, neither pleadings nor pretrial order in first suit were found to have raised retaliation case raised in second suit). ... Ordinarily, the determination of an issue that is not litigated in one proceeding is not barred later. **Issue preclusion, in contrast to claim preclusion, applies only to issues that were directly litigated and not to those that merely could have been litigated.** ... Issues that were litigated. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 459, 42 S. Ct. 363 66 L. Ed. 708 (1922) (issue preclusion does not apply to issues that might have been litigated)". 18 Moore's Federal Practice 3D, § 132.03 [2] [a] (Matthew Bender 3d ed.) under section entitled "Actually Litigated Requirement - Issues Must Have Been Actually Litigated".

Thus the issues of constructive discharge

and harassment which were not actually litigated, and which could not be litigated, cannot be used for issue preclusion or claim preclusion.

The opinion and final order of the district court in PJM-96-2913 dated November 12, 1999 dismissed the claim of a hostile work environment supposedly since "Lukacs had failed to exhaust his administrative remedies before bringing a claim for hostile work environment". "In an action brought by produce growers against a packing company, the defendant's authorization to promulgate agricultural standards was found **not to have been decided in a prior case, because it had been dismissed for failure to exhaust administrative remedies**. ... **Dismissal for failure to exhaust administrative remedies.** *Wileman Bros. & Elliot, Inc. v. Gianini*, 909 F.2d 332, 336-337 n.8 (9th Cir. 1990) (issue preclusion does not apply because earlier case was dismissed and issue was never decided)." 18 Moore's Federal Practice 3D, § 132.03 [2] [1] [i] (Matthew Bender 3d ed.) under section entitled "Insufficient Procedures for Issue Preclusion Purposes - Dismissals". Thus the claim for hostile work environment cannot now be the subject of claim preclusion or issue preclusion.

The opinion and final order of the district court in PJM-96-2913 dated November

12, 1999 dismissed the claim of breach of contract under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The opinion and final order of the district court in PJM-96-2913 dated November 12, 1999 also dismissed the "claim of failure to timely process EEO complaints" under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

"Issue preclusion operates to preclude the relitigation of only those issues necessary to support the judgment entered in the first action. ... **Issue must be necessary to support judgment for issue preclusion to apply.** *Haring v. Prosise*, 462 U.S. 306, 315, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) ("[C]ollateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action."). ... *2d Circuit St. Vincent's Hosp. v. Division of Human Rights*, 553 F. supp. 375, 379 (S.D.N.Y. 1982) (no issue was litigated because age discrimination claim was dismissed)." 18 Moore's Federal Practice 3D, § 132.03 [4] [a] (Matthew Bender 3d ed.) under section entitled "Necessarily Decided Requirement - Issue Necessary to Support Judgment".

Thus the dismissed claims of hostile working environment, breach of contract, and failure to timely process EEO complaints cannot be used for purposes of issue or claim preclusion.

"Federal Rule of Civil Procedure 12(b)(6) provides the basis for dismissing an action for "failure to state a claim upon which relief can be granted". Some cases, especially those decided before the adoption of Federal Rules, held that a dismissal for insufficient pleading was not on the merits. It was thought too harsh a remedy to preclude a party with a possibly meritorious claim from pursuing a second action simply because of a failure to meet some technical pleading requirement. This rationale was weakened considerably by the passage of the **Federal Rules of Civil Procedure, with their liberalized pleading requirements and right of amendment**. The Restatement (Second) of Judgments adopted the position that such a dismissal should be considered to be on the merits, reasoning that:

[s]uch a result is warranted by **the ease with which pleadings may be amended, normally at least once as a matter of course,** and by the unfairness of requiring the defendant to submit to a second action (often initiated long after the first has come to an end) when no such **amendment is sought**, or when no **appeal has been taken from an erroneous denial of leave to amend.**"

18 Moore's Federal Practice, § 131.30 [3] [e] (Matthew Bender 3d ed. 1997) under section entitled "Dismissal for Failure to State Claim Upon Which Relief Can Be Granted".

Unfortunately, although the Federal Rules

of Civil Procedure do have "**liberalized pleading requirements and right of amendment**", and there is supposedly "**ease with which pleadings may be amended, normally at least once as a matter of course**", in this case the record amply demonstrates that plaintiff was denied his "**right of amendment**", there was difficulty if not impossibility "**with which pleadings may be amended**", including threatened sanctions for even filing an amended complaint, even those which are supposedly granted "**normally at least once as a matter of course**", so although "**amendment was sought**" and "**appeal has been taken from an erroneous denial of leave to amend**", since the district court purposefully and intentionally denied plaintiff-appellant his "**right of amendment**", and plaintiff-appellant **did not have a full and fair opportunity to litigate the claim in the prior proceeding**, the dismissal under Federal Rule of Civil Procedure 12(b)(6) of the claim of hostile working environment, and the claim of breach of contract, and the claim of failure to timely process EEO complaints should not be able to be used for purposes of claim preclusion or issue preclusion.

In addition, since the original complaint only addressed six separate and distinct EEO complaints and therefore only the "**matters alleged to be discriminatory**" or only the

"**transactions**" or only the "**factual allegations**" in those six separate and distinct EEO complaints, the additional four dozen separate and distinct timely filed EEO complaints containing separate and distinct "**claims**" and separate and distinct "**matters alleged to be discriminatory**" and separate and distinct "**transactions**" and separate and distinct "**factual allegations**" and which "**could not have been raised in the prior litigation**" and on which plaintiff-appellant did not have a "**full and fair opportunity to litigate the claim in the prior proceeding**", thus cannot be used for purposes of claim preclusion or issue preclusion.

Plaintiff-appellant had also filed a Rule 56(f) affidavit on June 10, 1997, which was completely ignored by the district court. Even plaintiff-appellant's motion for leave to file the statement of material facts and affidavit and exhibits of plaintiff Frank Paul Lukacs which was filed on June 13, 1997, with the hearing originally scheduled for June 25, 1997, were completely ignored by the district court. Thus even the few remaining claims which were disposed under the motion for summary judgment, since plaintiff-appellant did not have a "**full and fair opportunity to litigate the claims in the prior proceeding**", cannot be used for purposes of claim preclusion or issue preclusion.

"Many of the most difficult questions concerning the scope of claim preclusion arise in the context of **continuing wrongful conduct**. ... Whatever the cut-off date, **a continuing series of wrongful acts resulting in ongoing damage to the plaintiff will usually permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine**. ... **Continuing series of wrongful acts will usually permit series of actions.** *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) (**each time plaintiff is injured by defendant, cause of action accrues**); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (series of torts will give rise to several causes of action); see *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), cert. denied, 459 U.S. 943 (1982) (continuing antitrust violations); *United Food & Commercial v. City Foods, Inc.*, 878 F. Supp. 122, 123 (N.D.Ill. 1995) (**"[A] defendant's continuing course of conduct, even if related to conduct complained of in the earlier lawsuit, generally creates a separate cause of action."**) 18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled "Continuing Wrongful Conduct by Defendant".

The different, separate, and distinct

transactions and facts of appellant's four dozen different, separate, and distinct EEO complaints in his civil actions can be characterized as "continuing wrongful conduct by defendant", or a "continuing series of wrongful acts permitting a series of actions", with each such action considered to be a separate claim unrestricted by the limitations of claim preclusion or duplication of claims.

"Even if all of the other prerequisites for claim preclusion are met, it will not be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the prior proceeding. Party against whom claim preclusion is asserted must have had full and fair opportunity to litigate claim in prior proceeding." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 & n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262, reh'g denied, 458 U.S. 1133 (1982) (although prior holdings regarding requirement of full and fair opportunity to litigate were in context of issue preclusion, invocation of claim preclusion is subject to same requirement). *7th Circuit Pirella v. Village of N. Aurora*, 935 F.2d 909, 913 (7th Cir.), cert. denied, 502 U.S. 983 (1991) ("It is a well-established principle that no decision may constitute res judicata if the party against whom it is

asserted has not had a full and fair opportunity to litigate his claims.") *9th Circuit California v. FCC*, 905 F.2d 1217, 1245 (9th Cir. 1990) (**claim preclusion no bar to subsequent action when party was not given full and fair opportunity to litigate claim in prior proceeding**). *11th Circuit Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985) (**"It is well settled that res judicata cannot be applied against a party who did not have a full and fair opportunity to litigate an issue in a previous suit."**). 18 Moore's Federal Practice, § 131.41 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Parties To Be Bound Must Have Had Full and Fair Opportunity to Litigate Prior Claim"**.

Here appellant never had any, much less a "full and fair, opportunity to litigate" any of the claims or any of the issues. Appellant was not even permitted to "amend the party's pleadings once as a matter of course at any time before a responsive pleading is served", with the district court judge ordering the clerk of the court that appellant's amended complaints not even be docketed and ordering that they instead be physically returned to appellant.

Even where trial courts raise preclusion issues sua sponte, "the parties must have

reasonable notice and opportunity to be heard before the application of claim preclusion by the court. Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied. *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (sua sponte application of preclusion not appropriate when court did not allow briefing on issue)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.)."

"[T]rial courts (and appellate courts as well) may raise preclusion issues sua sponte. Of course, **the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. ... Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied.** Compare *McClain v. Apodaca*, 793 F.2d 1031, 1032-1033 (9th Cir. 1986) (**sua sponte application of preclusion appropriate when district court heard evidence and gave both parties opportunity to address issue before ruling**) with *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (**sua sponte application of preclusion not appropriate when court did not allow briefing on issue**)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

As the record amply demonstrates,

appellant did not have reasonable notice and opportunity to be heard *before* the application of claim preclusion by the court, and in fact appellant did not have any notice at all or any opportunity at all to be heard *before* the application of claim preclusion by the court. Thus although the relevant cases state that "Parties must have reasonable notice and opportunity to be heard *before* claim preclusion is applied", here the district court was in a hurry to apply claim preclusion in a totally meaningless manner, totally ignoring all the relevant case law, especially since defendants were losing, and considering defendants supposed representatives the Department of Justice too incompetent to bring up, or meet the burden of proof on, claim preclusion or duplication of claims on their own. Then again the district court judge has been acting more like the real representative for defendants anyway, replacing the supposed representatives for defendants the Department of Justice, of whose professional legal competence the district court judge must have an even lower opinion than that of appellant.